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A PROPOSED SYSTEM OF SANCTIONS TO ENSURE
THE PRESERVATION OF HUMAN RIGHTS
DURING ARMED CONFLICT

James David Gass

A Proposed System of Sanctions to Ensure the Preservation of
Human Rights during Armed Conflict

By

James David Gass

B.S. June 1957, Union University

J.D. June 1965, Vanderbilt University

A Thesis submitted to

The Faculty of

The Law School

of The George Washington University in partial satisfaction
of the requirements for the degree of Master of Laws

September 30, 1972

Thesis directed by

William Thomas Mallison, Jr.

Professor of Law

T148482

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A Proposed System of Sanctions to Ensure the Preservation of Human Rights during Armed Conflict

INTRODUCTION

The recognition that basic human rights are crucial blocks in the structure of any society is rapidly finding its way into the realm of both international and municipal law. Certain human rights have long been set out in the United States Constitution.¹ Other documents setting forth human rights concepts, include the United Nations Universal Declaration of Human Rights,² and the European Convention of Human Rights,³ both of which are concerned with human rights on an international scale. Newly emerging nations, especially those which have recently gained their independence from colonial powers, tend to incorporate many of the principles enumerated in the U.N. Declaration of Human Rights into their constitutions.⁴ The foregoing documents generally set forth standards of conduct by governments toward individuals on a day to day basis, with exceptions for times of public turmoil when the security of the state is threatened. It is when the security of the state is threatened, that another set of rules, designed to ensure some minimum observance of humanitarian principles become applicable. These rules are set forth in various international conventions such as the Hague Conventions of 1907, restricting the means which may be employed in the conduct of armed conflicts,⁵ and the four Geneva Conventions⁶ which have as their principle goal, the protection of non-combatants, whether they are legitimate combatants who have been rendered hors de combat by some means, or whether they are civilians who have had no, or only limited involvement in the actual fighting. It may quickly be perceived that while the rules just noted are of a humanitarian nature, they apply to two different situations. The Hague Conventions are applicable in combat itself and may properly be termed the laws of war in the strict sense of the

word, while the Geneva Conventions are concerned only with the humane treatment of casualties and non-combatants.⁷

It would seem that the first two 1949 Geneva Conventions, i.e. the first concerned with amelioration of the condition of the sick and wounded in the field, and the second with the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, are perhaps more closely related in the problems of their enforcement, to the laws of war as expressed in the 1907 Hague Convention, than to those of the third and fourth Geneva Conventions. For this reason, only the third and fourth Geneva Conventions, respectively concerned with the treatment of prisoners of war, and the protection of civilian persons in time of war, will be considered.⁸

One of the most evident deficiencies in the enforcement of international law, is the absence of a centralized sanctioning authority. For this reason, some writers assert that the international law is unenforceable.⁹ Probably in no given area of international law is this assertion more nearly justified than in the rules governing warfare. The fourth Hague Convention, concerning the laws of war on land, provides in Article 3, that, "A belligerent party which violates the provisions... shall, if the case demands, be liable to pay compensation...."¹⁰ In the absence of some system to determine how much compensation is due, and the means of assuring payment, this sanction has proven all but useless, and so far as actually deterring illegal action, as contrasted to monetary compensation after the act, has had no discernable effect at all. Even this is one step beyond the Geneva Conventions, which contain no specific sanctions to be applied against errant states. It would thus seem that in the area in which severe physical suffering is most likely to occur, there are essentially no means of assuring compliance with the agreed standards of humane conduct as specified in the various conventions.

The aforementioned observations do not purport to assert that there are not in fact sanctions which are available and which are utilized. In fact, there are sanctions in international law. Reprisals of both a military and non-military nature, are the primary compulsive sanctions in the international order. But these sanctions are common to any primitive decentralized society,¹¹ and it would seem that a modern day community of nations should be able to make some affirmative contribution to advance the system above the primitive stage.

It is the theme of this article to suggest that at least in some circumstances where the issue is primarily one of human rights, the world community might make a start toward an effective international law sanctioning process. The third and fourth Geneva Conventions of 1949, which will be referred to hereafter as the POW (prisoner of war) and Civilian Conventions respectively, have defined in some detail the minimum humanitarian considerations to be extended to prisoners-of-war and to non-combatant civilians.¹² The Conventions, by their existence, demonstrate the awareness of state officials that many of the most serious atrocities do not necessarily occur on the battlefield,¹³ and also affirm through their acceptance by the bulk of nations, the desire to minimize unnecessary suffering. Yet, the absence of an effective sanctioning process dilutes the effectiveness of the Conventions at a time when weapons are becoming more destructive, and warfare in both its psychological aspects and execution, increasingly involves non-combatants. The need then is for some effective means of assuring that at least the minimum standards of humane conduct prevail. It is long past the time when the international community, for its own benefit, must accept some diminution of national sovereignty in exchange for an effective sanctioning process.¹⁴ A logical first step would seem to be in an area in which the conduct complained of is accepted by

essentially all nations as being illegal, in which it normally extends over a substantial period of time so as to allow international bodies sufficient time to react, and where the conduct itself is subject to objective evaluation by impartial observers. It is suggested that the principles set forth in the POW and Civilian Conventions meet these criterion.

Any reasoned approach to a sanctioning process for the POW and Civilian Conventions, must commence with an understanding of the objectives of these conventions. The Conventions are humanitarian and seek to set standards whereby the suffering inflicted on non-combatants, whether prisoners-of-war or civilians, is minimized.¹⁵ They attempt to do this by curbing the action which may legitimately be taken against civilians or prisoners-of-war, even though prisoners-of-war or civilians may themselves have violated the accepted rules of war.¹⁶ The principles set forth apply to all wars and armed conflicts (though there is argument that the conventions do not apply to internal conflicts), regardless of whether or not the conflict is "legal" or "just".¹⁷ The standards apply not only to conduct which physically injures a helpless person, but also to conduct which violates the dignity and honor of the individual.¹⁸ The Geneva Conventions are to be applied regardless of race, religion, nationality or politics, and are intended solely to minimize suffering incident to war.¹⁹ It is apparent that the POW and Civilian Conventions are designed to benefit those individuals who through the fortunes of war cannot help themselves. The underlying principles embodied in these conventions are therefore conceptualized in the basic rights to life, and human dignity.

In pursuing the thesis that a workable system of sanctions could be implemented, to enforce the third and fourth Geneva Conventions, this article will evaluate the factual situation in two contemporary conflict arenas (the Arab-Israeli conflict, and the Viet-Nam conflict) and will determine whether

there are currently violations of the Geneva Conventions in these arenas as they relate to civilians and prisoners-of-war. The article will then specify problems peculiar to those conflict arenas and offer some suggestions as to why the Geneva Conventions have not been effective there. With this background, it should be possible to determine the desirable characteristics of an effective sanctioning process, the considerations which enter into the establishment of such a process, and a determination of whether political considerations in the contemporary world would prohibit the establishment of effective sanctions for the POW and Civilian Conventions. Finally, the article will conclude with a specific recommendation for implementation of an effective sanctioning process for the POW and Civilian Conventions, a brief evaluation of how such a system might be applied in the Viet Nam conflict, and the practical difficulties of its application in the Arab-Israeli conflict.

I. Contemporary World Situations

The plight of civilians and prisoners-of-war in two contrasting conflict situations will be discussed under this heading. The first subject to be explored will be the refugees in the Arab-Israeli conflict. This situation illustrating the classical occupation of territory by a conquering power, may be contrasted with the circumstances prevailing in South Viet Nam where civilians are caught in the cross-fire of both conventional and guerrilla warfare. The plight of prisoners-of-war in the conventional sense will also be considered in each of these same conflict arenas.

A. Situations involving civilians.

1. Palestine Refugees

The dilemma of the Palestine refugees is so intimately entwined with the history of Palestine over the past sixty years that it is impossible to

intelligently discuss the matter without first referring to some of the historical material. Changing the name of the territory formerly called Palestine to its present name of Israel, further complicates the precise designation of both territory, and groups of people with ties to, or claims on that territory. For clarity, the following terms will be used throughout this article.

Jew - a voluntary adherent to the religious faith of Judaism.²⁰

Zionist - refers "...to a member or supporter of the modern political movement of Zionism..."²¹ which in turn advocates the constitution of the "Jewish people" as a national entity in which membership is conferred on all Jews."²²

Israel - refers "...to the present Near Eastern State of Israel."²³

Israeli - will refer to present Jewish inhabitants of Israel.

Palestine - will be used to refer to the territory prior to 1948 which is now included in the present state of Israel.

Arabs - refer to non-Jew inhabitants of Israel and the neighboring states.

Arab States - refers collectively to Egypt, Syria, Lebanon, and Jordan.

Palestinians - designates all inhabitants of Palestine prior to 1948.

Palestinian Refugees - identifies those Arabs who formerly resided in Palestine and whom the Israeli Jews now forbid to re-enter the state of Israel.

a. Background.

Jews claim a historical connection to Palestine which may be traced to early Biblical times (and which may incidentally account in a large measure for the general acceptance by the American public that Palestine belongs to the Jews). The Jews were banished from Palestine in the first century A.D. by their Roman Conquerers. When the Arabs took the territory from the Romans in 634 A.D., and recinded the Roman decree, few Jews returned to Palestine.²⁴ Hence, for about eighteen hundred years, from the first century A.D. until about 1855 when the first Jewish settlements of any size were made in Palestine,²⁵ Palestine was virtually devoid of Jews. Between 1855 and 1915, the Jewish agricultural colonies in Palestine increased until there were about 100,000

Jews in Palestine.²⁶ Although the movement among European Jews to repatriate Jews to Palestine could possibly trace its existence back to their original expulsion from Palestine in the first century, this movement was relatively insignificant until about 1897 when Theodore Herzi founded the first Zionist Congress.²⁷ The Zionist organization succeeded in securing from Britain the Balfour Declaration of 1917 thus paving the way for the establishment of a "national home for the Jewish people". With the League of Nations mandate assigning Palestine to Britain as a mandated territory,²⁸ this eventually led to the formation of the Jewish State of Israel.

It has been maintained that the Balfour Declaration which at the beginning was merely an agreement between Zionists, Jews and Britain, became an international instrument when its essential provisions were incorporated into the Palestine Mandate,²⁹ and though the mandate terminated in 1948 with the formation of the state of Israel, the Zionist-Israel claims which continued to be asserted citing the Balfour Declaration as authority, served, in the absence of objection by other states to establish the Balfour Declaration as customary international law.³⁰ It is thus argued that all clauses of the Balfour Declaration remain effective,³¹ which would include those provisions requiring "...that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine..."³² It may be questioned whether all the provisions of the Palestine Mandate terminated in 1948 in the sense that the entire Mandate became void from that time forward, creating the necessity for the Zionist to revive the Balfour Declaration and breathe some degree of international character into it to justify the origin of the Jewish claim to the territory of Israel. It is submitted that what was terminated in 1948, was merely the obligation of Britain to act as a Mandatory, and that those provisions of the Mandate which were necessary to effectuate

the establishment of a national home for the Jews continued in effect, as did those clauses of the Mandate requiring respect for the personal status of the various peoples and communities.³³ These provisions prohibited discrimination of any kind on the basis of race, religion or language,³⁴ and required the safeguarding of "the civil and religious rights of all the inhabitants of Palestine..."³⁵ (emphasis added). Valid and convincing evidence has been offered to prove that when the Balfour declaration was prepared, the British government did not intend to provide for the establishment of a Jewish State and that the term "national home" as used in the Balfour Declaration meant something less than an independent political entity.³⁶ This position has been repeatedly asserted by various writers who cite convincing evidence both prior to and subsequent to the Balfour Declaration in support of that position.³⁷ Yet, provisions of the Mandate which establish a Jewish Agency to advise and cooperate with the administration of economic and social matters,³⁸ to construct or operate public works, services and utilities and develop the countries natural resources,³⁹ as well as requiring that the Administration of Palestine "... facilitate the acquisition of Palestinian citizenship by Jews who take up permanent residence in Palestine."⁴⁰ can hardly be construed in any fashion other than preparations to eventually create a Jewish state. When these provisions are considered in conjunction with the preamble providing for "...reconstituting their national home in that country..."⁴¹ there can be no doubt that the term "national home" was intended by the mandate to be synonymous with a political entity as opposed to some sort of shrine or park. It would seem, therefore, that there are difficulties in the assertion that the Balfour Declaration currently serves as a juridical basis for the Jewish claims to Israel, and a literal acceptance of the claim that "The State of Israel, proclaimed in 1948, was born from the zionist claim that the Jews of the world constitute a separate nation entitled to a land of their

own and sovereign statehood."⁴² It is, instead, suggested that the state of Israel came into being as a direct result of the Mandate, and that Israel was created with a specific obligation to all Palestinians as particularized in the Mandate,⁴³ and not as a haven for Jews alone. It is further suggested that although the more pertinent provisions of the Balfour Declaration were written into the Mandate, those provisions were absorbed by the Mandate and given meaning exclusive of that indicated by the legislative history of the Balfour Declaration as considered by the appropriate British governmental bodies. The League members were likely unaware of the internal maneuvering incident to the publication of the Balfour Declaration by Britain, and therefore gave their own interpretation to the Declaration, which it has earlier been noted, on its face undoubtedly contemplated the formation of a political entity. What Britain may or may not have actually intended by the Balfour Declaration therefore is immaterial as its provisions (but not the Declaration) were given a new setting and propelled by the League of Nations into International Law.

In either event, whether the Jewish claims to Israel are factually based on the Mandate or on the Declaration, Israel is at the very least bound by the limitations contained in one or the other instrument to the effect that the Civil and religious rights of all Palestinians be safeguarded.

One of the major problems which faced the Zionist in establishing a Jewish State, was that Palestine was predominately populated by Arabs. There was no substantial flow of Jewish immigrants into Palestine until the 1930's, though by 1947 there were approximately 700,000 Jews in Palestine, who through their secret army, operated against both the Arabs and British.⁴⁴ These activities led the British to advise the General Assembly of the United Nations that Britain was no longer prepared to act as the Mandatory power,⁴⁵ and eventually led to several proposals before the United Nations to partition Palestine. By 1948 the state of Israel was a fact.

The right of the United Nations to partition Palestine against the wishes of a majority of the population has justly been assailed and in a juridical sense is highly questionable.⁴⁶ The United Nations however, is a political not a judicial creature. Although much of the blame for the present plight of the Palestinian refugees and the Arab-Israeli hostilities must reside with the United Nations,⁴⁷ the fact remains that the state of Israel IS, and the world community will have to cope with the facts as they exist, not as they might have, or even should have developed.

b. Participants.

The states of Lebanon, Syria, Jordan, and Egypt, the Palestine Refugees, and various Palestinian Guerrilla movements constitute the primary participants on one side of the Arab-Israeli conflict. On the other side is Israel and the Zionist organization. Of secondary importance on the Palestine refugee side is Russia, the primary source of arms for the Arabs. Of secondary importance on the Israeli side is the United States, the primary source of arms for Israel.

In addition to their ties to the Palestinians as a result of religion, economics and geography, the states of Lebanon, Syria, Jordan and Egypt became the sites of some 40 odd refugee camps following the Arab-Israeli war of 1948.⁴⁸ Immediately following the withdrawal of the British troops in 1948, Arab armies unsuccessfully attempted to support Palestinian claims to the land. During the ensuing war, the victorious Israel considerably expanded its frontiers as originally determined by the United Nations partition proposal, by occupying all of Palestine except the Gaza strip and the West Bank.⁴⁹

Israel has a population of about 2.93 million of which 2.56 million are Jews, and about 370,000 are of other faiths. It has an area of about 8,000 square miles,⁵⁰ exclusive of the Gaza Strip, the west bank of Jordan, the Golan Heights of Syria, and Egypt's Sianai Peninsula all of which are presently

under military occupation by Israel. Israel's immediate neighbors have a combined population of approximately 45 million people divided among the four nations as follows; Egypt 34 million,⁵¹ Jordan 2.1 million,⁵² Lebanon 2.7 million,⁵³ and Syria 6.3 million.⁵⁴ The great majority of these peoples are Moslem by faith. These four countries have a combined land area of nearly a half million square miles,⁵⁵ though a great portion of the land is either non-productive or marginally productive. The combination of population and nontillable land leads to economic problems, which are more pronounced in Egypt, than the other three countries.⁵⁶

c. Claims

According to Israel spokesmen and other sources, the armed forces in Egypt, Jordan, Syria, Lebanon and Iraq, with support from Saudi Arabia and the Yeman marched against Israel on May 14, 1948, the day of Israel's declaration of Independence.⁵⁷ Israel is therefore frequently characterized as a young nation struggling for survival against larger hostile neighboring states and forced to elect survival over the technical observance of rules of international law.⁵⁸ The Palestine refugee problem is, according to Israel, the direct result of the attacks on Israel by the several Arab armies previously mentioned, and accordingly the responsibility for the refugees lies with those states.⁵⁹ Israel therefore maintains that those states should absorb the refugees within their own economies, as Israel has absorbed Jews from other lands within her boundaries.⁶⁰

The Arab position and the evidence which supports that position does not portray the picture so clearly, although from a practical standpoint, the Israeli position would appear to have some merit.

In determining whether Israel has violated the Civilian Geneva Convention, it could be asserted that one need look no further than the findings of the U.N. commission on Human Rights, and the several resolutions of the U.N. General Assembly. On March 22, 1972, the U.N. Commission on Human Rights passed a resolution charging that Israel had violated the provisions of the civilian convention by her declared intentions to annex portions of occupied Arab territory; the establishment of Israeli settlements in those territories; the destruction of villages and houses and confiscation and expropriation of property; denying refugees the right to return to their homes; the collective punishment and ill-treatment of prisoners, and the holding of prisoners incommunicado.⁶¹ This finding by the Human Rights Commission followed a United Nations General Assembly resolution on December 6, 1971 stating that Israel had violated Articles 49 and 53 of the Civilian Convention by destroying refugee shelters in the Gaza Strip and sending the occupants to other areas, including areas outside the Gaza Strip.⁶² On December 20, 1971, the General Assembly again asserted that Israel had violated the Civilian Convention and called upon Israel to comply with the Convention and to cease specified acts which were violative of the Convention.⁶³ (These acts are the same as those noted earlier in this paragraph as having been found by the Human Rights Commission to violate the Civilian Convention.) Although these actions by the General Assembly and the Human Rights Commission merit consideration, it must be recalled that these determinations were made by a political rather than judicial body, and should not be taken at face value without some independent investigation. Accordingly, the positions of Israel and the Arab parties (including the Palestine refugees and the Arab States) will now be reviewed.

(1) Claims Concerning the Responsibility for creating the Palestine Refugee Population.

It has been observed that the Palestine Mandate, whereby a national home for the Jews was to be established in Palestine, was from its inception destined to result in bitter antagonism between the immigrant Jews and the resident Palestinians. The plan to move immigrants into a land already settled, with its own culture and long developed Arabic society did not contemplate the absorption of the immigrants into this existing society, but rather the imposition of a new society in the image of the newcomers.⁶⁴ With the implementation of this plan, antagonism between the immigrant Jews and the Palestinian Arabs was accelerated, ultimately resulting in the Arab states attacking Israel in 1948 in support of the Palestinians' claim to land within the Israeli portion of Palestine as partitioned by the United Nations. It was this war which resulted in the great bulk of Palestinian Refugees. Israel maintains that the refugees voluntarily left Palestine when they were urged by their leaders and the surrounding Arab states to seek shelter in the Arab states and await Israel's defeat, at which time they would return and share in the spoils of war.⁶⁵ The Arabs on the other hand, maintain that the Palestinian refugees who left Israel were frightened out by regular Israeli military units and Israel guerrilla units, which threatened the Arabs with death and reminded them of the fate of the inhabitants of Keir Yassin, a town in which essentially all who resided there, men, women and children were killed by Israeli guerrillas.⁶⁶ Although one could argue that the Israeli government could not be held responsible for the actions of guerrilla forces not a part of her regular military units, this argument rings hollow when it is noted that the members of those units are now paid the same war pensions as regular troops.⁶⁷ At the very least Israel by this action, ratified the

actions of the guerrilla units and they should therefore be chargeable to the state of Israel.

Whatever the reason, something in excess of 800,000 Palestinian Arabs did either seek refuge in neighboring Arab states, or were forced to go there,⁶⁸ depending on whether one gives credence to the Arab or the Israeli accounts.

It is further asserted that during the six day war in June, 1967, Israel again expelled many Arabs from the West Bank of Jordan, an area now occupied by Israeli troops.⁶⁹ There are then at least two major groups of Palestinian refugees, one from the 1948 war and one from the 1967 war. Doubtless, some of the refugees expelled from the West Bank were among those who originally fled Israel in 1948 and have now twice fled the advancing Israelis.

The Israeli officials apparently expected the Palestinian refugees to be assimilated into the economics of the surrounding states. As early as 1949, the Prime Minister of Israel stated that Israel considered the solution to the refugee problem was their settlement in the surrounding Arab States.⁷⁰ This position has not changed over the years, and indeed Israeli officials now seem to be somewhat perplexed that the refugees have not become integrated into the economics of these states.⁷¹ Instead, the refugees continue to live in refugee camps subsisting in large measure through various international assistance programs.⁷²

It has been urged that Israel has improperly linked the Palestine refugee problem to peace settlements with the surrounding Arab states. The rationale of this argument appears to be the proposition that removing the refugees from the territory of the surrounding Arab states, is not an obligation owed to the Arab states, but is instead an obligation owed to the individual refugees as inhabitants of the territory occupied by Israel.⁷³ Indeed, when the overall picture presented by the refugees is considered, it is sometimes difficult to recall that when numbers

such as a half-million or a million refugees are mentioned, the subject is not just so many ciphers, but instead a single individual human being who has lost his house, his livelihood and his homeland; multiplied a million times. When viewed in this light, the problem stands forth as a purely humanitarian one.

Aside however, from the humanitarian aspects of the Palestine refugee problem, there stands the juridical problem of whether the official conduct of Israel toward the Palestinians has violated the civilian convention. Article 49 of the convention provides in part that "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive."⁷⁴ The fact that Israel asserts that the refugees from Palestine left voluntarily at the urging of Arab leaders, and that the Arab states and the refugees themselves insist that Israeli troops and guerrilla units forced them out of Israel, would tend to indicate that both sides conceive the forcible evacuation of the population as an essential ingredient to a violation of Article 49. It is here suggested that the stimulus which caused the refugees to leave Israel is immaterial, and it does not matter whether their departure from areas under attack or which were considered to be dangerous, was voluntary or not. The essence of Article 49 is that the civilian population will not be involuntarily separated from their area of residence. That separation may be as effectively accomplished by denying access to the area after the residents have fled to safety from whatever cause, as from loading them into trucks and carting them away. It is the basic right to continue residing in one's home territory after danger has passed that is the essence of the Article. Israel has clearly violated the first clause of Article 49, regardless of whether one accepts the Israeli or Arab version of why the inhabitants left.

Even though Israel has violated the first clause of Article 49 of the Convention, it is a rare case which does not have two sides, with some varying degrees of merit on each. It is thus necessary to ascertain if there is any justifiable reason under international law for the present and past actions of Israel in excluding the Palestinian refugees from Israel.

The second clause of Article 49 provides:

"...(T)he Occupying Power may undertake total or partial evacuation of a given area if the Security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."⁷⁵

The second clause of Article 49 would seem to incorporate the concept of 'military necessity' into the article and so permit the evacuation of the population from an area if their security, or the military situation dictated. From the Israeli point of view it could be argued that the initial evacuation of the Arab population was for their own safety as the entire area was under attack, and that their continued expulsion from the area is necessary because the Refugees themselves have since become a military threat to the state of Israel. Following the Arab's departure from Israel and their location in refugee camps in the surrounding Arab states, guerrilla units were organized and trained to carry out operations against Israel.⁷⁶ With the assistance of the Arab states, these groups initiated armed attacks by guerrilla bands against Israeli military objectives and participated in terrorist activity against the general population of Israel in their efforts to harrass Israel, and eventually recover the territory which had been Palestine. With Israel's occupation of substantial portions of the Arab states during the 1967 war, the Palestinian refugees established guerrilla movements and operated from

among the populations of the occupied areas.⁷⁷ Israel can therefore argue with some justification that the guerrilla movements which are harbored among the Palestine refugees demonstrably pose a military threat to the state of Israel, and therefore their continued exclusion from Israel complies with the second clause of Article 49.

On the other hand, the guerrilla spokesmen are quick to point out that the Palestinian people who were expelled from their land and homes by the Israelis were entitled to assistance from the United Nations to ensure implementation of that part of the Mandate which assured that the civil rights of Palestinians would not be effected by the establishment of a national home for the Jews, and that when no action was forthcoming, they had no choice but to organize and fight as best they could to regain their homeland.⁷⁸ As might be expected, given the experience of the refugees, their goal now is the expulsion of all Jews from what is now Israel.⁷⁹ In pursuit of this goal, the Palestinian Guerrillas have resorted to terror tactics. Although a "successful" terror attack may serve to bolster the morale of the guerrilla units,⁸⁰ and harrass the Israelis, it is likely that such attacks on non-military objectives serve to portray the Palestine refugees as senseless murderers. Such tactics are likely a major contributing factor to the U.S. apathy toward the circumstances of the refugees. Actions such as hiring foreign communist oriented radicals to conduct a suicide attack on unarmed civilians as happened in TelAviv on May 30, 1972, and resulted in the murder of 26 people and the wounding of 81 others,⁸¹ and the attempt to train and infiltrate guerrillas into other countries not directly concerned with the Jewish occupation of Israel,⁸² can only serve to destroy any support the refugees were entitled to expect from the non-communist states. Indeed some members of the committee of

the United Nations Relief and Works Agency have already indicated that their governments question the propriety of increasing aid to the Palestine refugees, as a result of various acts of air piracy and the terrorist activities of Arab guerrillas.⁸³

The Arab guerrillas then would seem to have given some considerable support to the proposition that the repatriation of the Palestine refugees in Israel would pose a military threat to Israel, and continued terrorist activity by the guerrillas could conceivably even erode the support for the Palestine refugees that has been evidenced by the numerous General Assembly resolutions and findings of the Human Rights Commission.

From a purely juridical point of view however, an assertion by Israel that the refugees pose a military threat to Israel and may thus be excluded from the territory must fail. For the second clause of Article 49 also provides that except in the case where it is impossible to avoid such displacement, protected persons will not be moved outside the boundaries of the occupied territory; and if such displacement is necessary, they will be returned to their homes immediately upon cessation of active hostilities.⁸⁴ It is manifestly clear that Israel did not comply with either of these provisions. The nearest Israel has come to indicating a willingness to readmit Palestinian refugees to Israel, unconnected with a permanent peace settlement with the Arab countries, was in 1949 when the Israel delegation indicated at peace talks then in progress, that Israel was willing to accept the refugees (totaling about 270,000 persons) and the regular inhabitants then located in the Gaza Strip, provided the Gaza Strip was annexed by Israel.⁸⁵

It must be concluded that even accepting the initial dislocation of the Arabs from Palestine as legal under the provision of Article 49, the continued exclusion of those persons from Israel after active hostilities ceased, is a violation of Article 49 of the Civilian Convention.

(2) Claims concerning individually owned Arab Property in Israel and Occupied Territories.

Reliable and impartial information concerning the treatment accorded Arabs residing in Israel and areas occupied by Israel is not readily available. Most of the materials on the subject have either been prepared by Zionist or by Arabic sources, or by persons sympathetic to one side or the other and are therefore of questionable validity. It could be argued that the impartial reports by the International Red Cross reflecting that students from the Gaza Strip are permitted to travel back and forth between the university in Cairo and their homes in Gaza,⁸⁶ indicate that the Israelis are making every effort to treat the occupants of that territory in a fair and equitable manner.

Additionally, the International Red Cross has disclosed that between June 1969 and September 1971 it has arranged for over 55,000 visits to prisoners and Arab civilians who are detained in Israel or occupied territories.⁸⁷ While indicating that the allegation by the Human Rights Commission that Arabs are held incommunicado may be open to question,⁸⁸ this figure also establishes that in fact considerable numbers of Arabs are either detained or confined. This immediately raises the question as to whether the prolonged detainment of Arab civilians and military personnel is in violation of Article 42 of the Civilian Convention,⁸⁹ and Article 118 of the POW Convention.⁹⁰ Only the question relating to civilians will be considered at this point. At the outset, it would appear that the detained Arab civilians are treated with some degree of consideration during their detention. They are permitted visitors,⁹¹ are permitted to receive and transmit messages to their families,⁹² and the International Red Cross is permitted to visit and talk with Arab Detainees in private.⁹³ The question then is whether the detention itself is a violation of Article 42 of the Civilian Convention which provides for internment only so long as absolutely necessary.⁹⁴ Israel would maintain that the civilian

detainees have been either directly or indirectly involved in guerrilla or terrorist activity, and have proven themselves a threat to Israel's security. Except to consider each detainee on a case by case basis, it is impossible to determine with any degree of certainty whether these individuals are being illegally detained. The boasts of Arab guerrillas as to the extent of their activities⁹⁵ would seem to portray a large number of individuals involved in those activities, which would in turn be expected to generate a considerable number of captives. It must therefore be concluded that at least in the great majority of cases, Arab civilians are not being illegally detained in violation of the Geneva Convention.

The Palestinian Arabs maintain that Israel has taken real properties of those persons who fled Palestine during the 1948 war. The land which belonged to refugees is alleged to have been sold by an official Israeli custodian to a Development Authority, which it is charged, was expressly created by the state to liquidate Arab refugee property.⁹⁶ It has been charged that approximately 450,000 forms asserting ownership of property in Israel by Palestinian refugees have been prepared and filed with the United Nations.⁹⁷ The importance to Israel of the land involved is emphasized when it is considered that at the time of the 1949 Armistice between Israel and the surrounding Arab states, over one half of the cultivatable land was owned by Arabs.⁹⁸ Israel on the other hand asserts that the property of the Arabs who fled during the 1948 war, then became the property of Israel.⁹⁹ The juridical basis for this change in title is not evident. It is here submitted that the fact that a civilian, whatever his race or religion, who avails himself of the privilege under Article 35 of the Civilian Convention to leave the area of conflict,¹⁰⁰ is entitled to do so, and to return when the immediate danger is past without having lost his right to ownership of property necessarily left behind. It

would be a strange rule of humanitarian law which provided for ones immediate safety only on condition that he forfeit all his property rights. Although Article 33 prohibits pillage and reprisals against property,¹⁰¹ and Article 53 prohibits destruction of real property except for absolute military necessity,¹⁰² no Article of the Civilian Convention would seem to directly prohibit the confiscation of individual real property by an Occupying Power. It would seem, however, that the purpose of Article 53 is to preserve the property of individuals. Since the seizure of the real property itself is more harmful to the owner than is the destruction of the buildings on it, it would follow that if the seizure of private real property is permitted, though its destruction is prohibited, the purpose of the Article would be frustrated. Additionally, the international rule permitting an occupying power to administer and enjoy the use of real property belonging to the occupied state,¹⁰³ would, by implication, seem to prohibit the taking of individually owned real property. The last clause of Article 49 which prohibits an Occupying Power from transferring part of its own population to an occupied territory would further establish a prohibition against the seizure of privately owned real property. Thus if the purpose of Article 53 is effectuated, it is clear that the confiscation without compensation of privately owned real property is contrary to that Article.

It has been charged that there has been needless destruction of homes in the absence of military operations,¹⁰⁴ contrary to Article 53 of the Civilian Convention,¹⁰⁵ and that houses and shops have been destroyed in reprisal for their owners alleged involvement in activities designed to undermine the Israeli government.¹⁰⁶ Although reprisals normally permit the use of otherwise illegal means of warfare when necessary to deter an enemy from continuing illegal conduct, Article 33 specifically exempts from reprisal action,

reprisals against both protected persons and their property.¹⁰⁷ Also it has been claimed that Israel practiced looting on a large scale, specifically in Kuneitra in the Golan Heights of Syria.¹⁰⁸ Article 33 specifically prohibits pillage.¹⁰⁹

- (3) Has Israel violated the Civilian Convention respecting Arab property located within the state of Israel and territory occupied in 1948?

Without doubt Israel has violated the Civilian Convention by destroying individually owned real property in areas occupied in 1967.¹¹⁰ Officially sanctioned looting or looting on such a scale as to charge commanders with knowledge of the activity,¹¹¹ in areas occupied in 1967 also violate the Civilian Convention. A different issue, however, is posed as to the same activity within the boundaries of Israel, since if Israel's action is taken within her own boundaries, the Civilian Convention would not be applicable. It is therefore necessary to determine the actual status of the territory over which Israel claims sovereignty.

The United Nations General Assembly Resolution for the partition of Palestine provided;

"Independent Arab and Jewish states and the Special International Regime for the City of Jerusalem...shall come into existence...not later than 1 October 1948. The boundaries of the Arab State, the Jewish state, and the City of Jerusalem shall be as described..."¹¹²

The attack on the proposed Jewish state by Egypt, Jordan, Syria and Lebanon before the resolution could be fully executed (The Arabs would not accept the resolution), resulted in Israel conquering most of the area which would have constituted the Arab State. The Armistice agreements signed on 24 February, 1949 between Israel and the four Arab nations established armistice boundaries, but provided that the boundaries were to be construed as ceasefire boundaries and should not be regarded as a settlement of the Palestine question. The agreement with Egypt was most emphatic on this point;

"The Armistice Demarcation Line is not to be considered in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question."¹¹³

Under the generally accepted principles of international law, an armistice merely provides for a temporary cessation of active combat, and does not resolve the cause of the conflict or establish permanent boundaries.¹¹⁴ It is submitted that the same General Assembly resolution which brought Israel into being also created an Arab State, since if the United Nations had the power to divide Palestine against the wishes of a majority of the people, its resolution establishing a Jewish state must have likewise established an Arab state, even against the wishes of the Arabs. It follows that when Israel occupied the territory designated for the Arab state, it effectively occupied the embryo state. At the very least, the occupation of that territory by Israel, whether the fledgling Arab state had reached a de jure existence or not, constituted an invasion of territory not belonging to Israel, since the Resolution defined Israel's boundaries, and the subsequent Armistice agreement could not rescind the applicability of the Convention to Arabs located in those occupied areas.¹¹⁵ The subsequent claim of Israel to sovereignty over this territory and the apparent acceptance of this claim by most states would not alter that obligation.¹¹⁶ The purpose of the Civilian Convention is to afford protection to individuals located in an area occupied by a foreign force. It is not concerned with the establishment of boundaries. In any event many of the charges leveled against Israel occurred prior to the Armistice, and even assuming for the sake of argument that Israel's claim to sovereignty over the territory, did at some indeterminate time ripen into de jure sovereignty, Israel certainly has not accepted the Arabs as Israeli nationals. Even then,

conceding the sovereignty of Israel over all the territory claimed, the individuals within those boundaries are still within the protection of the principles set forth in the Civilian Convention which provides:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or occupying Power of which they are not nationals."¹¹⁷

It must be noted however that Israel's violation of the principles of the Convention is not alone determinative of whether sanctions, even if currently available could be applied against Israel respecting violations which occurred in the 1948 war. For the Civilian Convention was not drafted until August, 1949. This matter will be discussed later in this paper (VII B).

(4) Violations of the Civilian Convention Respecting Territory occupied in the 1967 War.

In the 1967 war between Israel, and Egypt, Syria, and Jordan, Israeli troops occupied Egypt's Sinai Peninsula and the Gaza Strip, Syria's Golan Heights and the West Bank of Jordan.¹¹⁸ It has been charged that Israel is making numerous Jewish settlements in all of these territories,¹¹⁹ and that Israel's refusal to withdraw from those areas proves it is pursuing a course of expansion through conquest.¹²⁰ There is substantial evidence from Israel itself to establish both of these allegations as to territory occupied in 1967. Announcements of officially established settlements in the Gaza Strip have recently been made,¹²¹ and Israel has officially expressed its intention to annex the Gaza Strip.¹²²

The Jewish settlement of the areas occupied by Israel in 1967 without doubt violates Article 49 of the Civilian Convention which provides, "The Occupying power shall not... transfer part of its own civilian population into the territory it occupies."¹²³ Nonetheless, the Israeli position is not entirely without merit. The areas in question have long been sites of

guerrilla activity launched against Israel, and an occasion for minor incidents between the regular armed forces of Israel and the other countries. Golan Heights is of considerable strategic value located as it is above agriculture lands occupied and farmed by Israelis. Israel has alleged that this area had been used to launch attacks on the Israeli settlements, and there were therefore numerous incidents between Syria and Israel in that area prior to 1967.¹²⁴ Forcing the Palestine refugees from their homes into camps in the Gaza Strip, the West Bank, in Lebanon, and in Syria and their remaining in these camps for many years, is doubtless the reason for the many acts of terrorism and retaliatory raids launched back and forth across the demarcation lines established by the Armistice Agreement of 1949.¹²⁵ Nonetheless the incidents did take place and in many cases the guerrillas likely had the unofficial backing of the state in which they were located. These states then can not be absolved from responsibility for these attacks. However, since the 1967 ceasefire, the Arab states have made some considerable effort to curb the guerrilla activity being waged from within their borders.¹²⁶ This pressure by the Arab governments has been somewhat effective in recent months,¹²⁷ but it must be conceded that the example set by Israel in literally seizing the property from which such attacks had previously taken place was not lost on the Arab states. Given Israel's past record for seizing and retaining territory when the opportunity presented itself, the surrounding states are likely acting in self-interest rather than through any concern for the welfare of Israeli residents. Israel's practice of seizing and retaining territory from which guerrilla attacks have been launched does have some merit, however. In 1956 Israel occupied the Gaza Strip and Sinai Peninsula following a prolonged period of guerrilla attacks from those areas.¹²⁸ These territories were then abandoned by Israel in 1957 with the establishment of a U.N.

Emergency Force.¹²⁹ Israel's apparent assumption that this arrangement would stop the border raids proved to be ill-founded, and in 1967 Israel was again at war. The Israelis then have a plausible reason based on their military security for the continued occupancy of these areas since 1967.¹³⁰

Despite Israel's assumed military justification for the retention of the areas occupied in 1967, this is not a unique situation. With some exceptions, every state could enhance its national security by creating a buffer zone at the expense of its neighbors. The point involved in this paper, and the point emphasized in the last clause of Article 49 of the Civilian Convention prohibiting the transfer of an occupying state's civilian population into occupied territory,¹³¹ is the protection of the vested rights of the population already located in that territory occupied by the occupying power.¹³² Article 49 is in treaty form, the formal recognition of the principle that a state should not be permitted to expand its borders by military action against its neighbors.¹³³ From a humanitarian point of view, it need only be noted that Israel's initial expansion in 1948 and subsequent expansion in 1967 was accomplished by seizing that area designated by the United Nations as an Arab State, the expulsion of Arabs from the area, or at the very least the refusal to permit them to return to their homes, and the seizure of their property. It should not be forgotten that for every Jew settled on a farm in Israel, an Arab became the unwilling tenant of a refugee camp in a neighboring state.

(5) Israel's violation of the Civilian Convention confirmed.

The foregoing discussion of the circumstances of Israel's occupation of certain areas and the disposition of property located therein, establish as a minimum that Israel has violated Article 33 of the Civilian Convention, by permitting her soldiers to participate in widespread looting, and by the unnecessary destruction of real property belonging to Arabs in occupied

territory. Israel has also violated Article 49 by refusing to permit those Arabs who fled in 1948 and 1967 to return to their homes, and by settling Israelis on land occupied in the 1948 and 1967 wars. Israel has further unnecessarily destroyed numerous homes and seized individually owned real property in violation of Article 53 of the Civilian Convention. Even though it is possible that other violations have been committed, the foregoing violations as a minimum indicate the need for some means to enforce the Civilian Convention as respects individual property rights in and around Israel. In the last analysis where individual real property rights are concerned, the seizure of real property by one state and its settlement by nationals of the occupying state, in reality involves the stripping of one group of individuals of their property through armed force, and awarding it to other individuals based on their nationality.

2. Civilians in Viet Nam.

The war between North and South Viet Nam of which the Viet Cong guerrilla movement is a part, has been particularly difficult for the civilian population in South Viet Nam. In addition to the standard conventional warfare with more or less fixed military positions and lines which have prevailed since April 1972, the civilian populace in South Viet Nam have been confronted with years of guerrilla warfare and terrorist activity along with other periods of more or less conventional warfare.

a. Background

Following over seven years of war in Indo-China between France and the vietninh,¹³⁴ the Geneva accords were reached in 1954 terminating active hostilities in that area.¹³⁵ At the outset there were serious problems with the agreements as they pertained to Viet Nam. In the first instance, the South Vietnamese delegation considered the agreement to be made as one constituting only a cease-fire and not a political settlement.¹³⁶ It

questioned the authority of France to bind it to a cease-fire without its consent.¹³⁷ The South Vietnamese further considered its military position perilous since the North Vietnamese had a strong independent military force toughened by several years fighting, while South Viet Nam's army was, at the best, of questionable effectiveness.¹³⁸ South Viet Nam's fears were borne out as the North Vietnamese began immediately in 1954 and over the next five years to establish communist cadres in South Viet Nam.¹³⁹ As the Communist political activity increased in South Viet Nam, frequently accompanied by acts of terrorism, the North Vietnamese began to supplement their cadres in the South with regular army troops.¹⁴⁰

As the Military and terrorist pace quickened in South Viet Nam, one of the primary claims put forth by North Viet Nam in justification for its involvement in the south, was the refusal of South Viet Nam to permit the elections called for by Article 7 of the Final Declaration of the Geneva Accords.¹⁴¹ South Viet Nam countered this charge by pointing out that it had never agreed to, and had in fact objected to the election provision,¹⁴² and that these provisions demanded;

"...(T)he settlement of political problems, effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot."¹⁴³

South Viet Nam could further point to the internal situation in North Viet Nam which degenerated the political processes in that country to that of a police state, and which assured that any elections held in North Viet Nam would not be a free expression of the will of the people, but would instead merely mirror the official Communist government's position.¹⁴⁴ That position is clearly spelled out in the North Vietnamese constitution:

"...(I)n the south, the U.S. imperialists and their henchmen have been savagely repressing the patriotic movement of our people... But our Southern compatriots have constantly struggled heroically and refused to submit to them....The cause of peaceful reunification of the Fatherland will certainly be victorious....Under the clear-sighted leadership of the VietNam Lao Dong Party...our entire people, broadly united within the National United Front, will surely win glorious success in the building of socialism in North Viet Nam and the struggle for national reunification..."¹⁴⁵

It is thus the stated national policy of North Viet Nam to unify North and South Viet Nam. North Viet Nam's involvement in South Viet Nam is directed to this end. In its quest to unify Viet Nam under a Communist regime, North Viet Nam is assisted by Russia and Communist China, both of which provide supplies and arms as well as advisers.

b. Participants

The United States has been interested in the Vietnam situation since immediately following World War II, and participated in the negotiations leading up to the Geneva accords of 1954.¹⁴⁶ Its ultimate commitment of combat troops, aerial and naval support was made pursuant to the Southeast Asia Collective Defense treaty¹⁴⁷ which was also the basis for commitment of Military personnel by Australia, New Zealand, the Philippines, and Thailand.¹⁴⁸ While there is disagreement among authorities as to the legality of the United States involvement in Viet Nam under both international and municipal law,¹⁴⁹ the respective legalities of the involvement of the United States combat personnel cannot alter the undisputed proposition that these personnel are in fact involved in combat operations. The resulting battle casualties involving both military personnel and civilians, are the same, regardless of which formalities were or were not observed at any given time preceding the actual commencement of hostilities.

It is apparent then, that the primary combatants in Viet Nam are South Viet Nam and the United States on one side, and North Viet Nam and those

Communist cadres established by North Viet Nam in the South (Viet Cong) on the other. Though not actually known to be engaged in the fighting in South Viet Nam, Communist China and Russia also exert great influence on the course of the war by providing materials and advice to North Viet Nam and therefore are involved in the conflict to that extent.

c. Acts Directed Toward Civilians.

In the Vietnamese conflict, civilians in both North and South Viet Nam have come under fire. The South Vietnamese civilians have been the object of attacks by Viet Cong and North Vietnamese soldiers. Additionally, there have doubtless been incidents in which South Vietnamese soldiers and American troops have either purposefully or accidentally brought South Vietnamese civilians under fire. There are of course in any war, those atrocities committed by incapable leaders such as the My Lai incident charged to Lt. William L. Calley, Jr., U.S. Army, in which at least 109 civilians, men, women, and children, were murdered.¹⁵⁰ Such atrocities inevitably happen on both sides in a war, and My Lai has its counterpart in numerous attacks by both the Viet Cong and North Vietnamese against South Vietnamese civilians. A case in point is the attack by a North Vietnamese sapper battalion on the families of regional force members in a small South Vietnamese village in which grenades and rifles were used to kill an estimated 100 women and children,¹⁵¹ and a similar attack at Dak Son in which the Viet Cong used flamethrowers and firearms to kill 252 women and children after first isolating the militamen away from town.¹⁵² As grim as these stories portray the fate of non-combatants caught up in a war, such incidents are beyond the scope of this article. Such conduct comes within the Laws of War as expressed in the Hague Conventions and the Nuremberg Trials. Even then it has been observed that the laws of war provide precious little protection for non-combatants in an area of

hostilities.¹⁵³ This article however, is only concerned with civilians in occupied territory.

At the outset it should be noted that whereas in the Arab-Israeli conflict the concern was primarily with property rights, in the Vietnamese arena the concern is almost exclusively with two articles of the Civilian Convention designed to protect the person of individuals in an occupied area. Article 27 states in part:

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights...They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."¹⁵⁴

Article 32 further amplifies the protection to be afforded civilians:

"The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, (and) torture..."¹⁵⁵

It is these two articles to which reference will frequently be made in the remainder of this section.

(1) Acts directed towards civilians by the Viet Cong.

Although the Viet Cong have committed many atrocities which violate the provisions of the 1907 Hague Convention, now accepted as customary international law, there are few instances in which it can definitely be asserted that they have violated the provisions of the Civilian Convention. This is because they seldom "occupy" an area within the sense that they control the government and the people, and establish militarily enforced demarcation lines between areas they control and that the South Vietnamese government controls. Nonetheless, they exert considerable control in some areas and have committed many atrocities in those areas. During the period from January 1966 through 1969, over 44,000 individuals were killed or abducted by the Viet Cong.¹⁵⁶ Typical instances are those in which a Viet Cong official and two executioners

entered a compound of canal workers, charged that someone had been informing on the guerrillas in that area, and directed gunfire that killed eighteen men, a woman and four small children as they lay in their beds,¹⁵⁷ There are areas over which the Viet Cong seem to have marginal control, at least to the extent that they can hold prisoners for long periods of time. Such a case was Lan Van Sang, a farmer who was arrested by the Viet Cong, kept in captivity for four months while chained to eleven other prisoners, and then left for dead with the eleven after the Viet Cong cut their throats and stabbed them on the approach of government troops.¹⁵⁸ Still, however, even in such marginally controlled areas, where the Viet Cong could for several months hold a group of a dozen persons prisoner undetected, it is considered extremely doubtful that the Civilian Convention is applicable. Such an area can best probably be described as a "no-man's" land.

There has been at least one period of time in which the Viet Cong have controlled territory to the extent that they "occupied" it within the context of the Civilian Convention. During the Tet offensive in 1968, Viet Cong cadres occupied several areas in South Viet Nam. One of these areas was Hue. During the time they occupied Hue, the Viet Cong killed approximately 5,800 civilians. The bodies of most of these victims were found in single and mass graves throughout the province surrounding Hue.¹⁵⁹ In some areas the victims had been tied together in groups of 10 to 20, placed in front of open mass graves and shot.¹⁶⁰ These killings were done by local Viet Cong Cadres and were part of an overall plan to eliminate individuals of stature who were loyal to the South Vietnamese government.¹⁶¹

The Viet Cong, have therefore violated Articles 27 and 32 of the Civilian Convention. The difficulty that remains however, is whether the Viet Cong, not being signatories to the Civilian Convention, could be made the subject

of sanctions for their failure to observe the provisions of Articles 27 and 32. These Articles set forth principles which are embodied in Article 46 of the 1907 Hague Convention.¹⁶² The Court in the Nuremberg trials held that:

"Article 6 (b) of the Charter provides that 'ill-treatment...of civilian population of or in occupied territory...killing of hostages...wanton destruction of cities, towns or villages', shall be a war crime. In the main these provisions are declaratory of the existing laws of war as expressed in the Hague Convention, Article 46..."¹⁶³

In a different decision the court opined;

"In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement..."¹⁶⁴

The conduct of the Viet Cong, by violating substantive provisions of the Civilian Convention also violates the accepted rules of warfare. Although such conduct would properly be triable as a war crime, it cannot be maintained that the provisions of the Civilian Convention itself are binding on the Viet Cong.

Article 1 of the Civilian Convention obligates each "High Contracting Power" to "...respect and to ensure respect for the present convention in all circumstances."¹⁶⁵ Dr. Pictet, in his commentary on the Geneva Conventions has asserted that the term "to ensure respect", demands that the Contracting Parties should make every effort to ensure universal compliance with the principles enunciated in the conventions.¹⁶⁶ Article 1 of the Civilian Convention would thus seem to require that all nations apply whatever sanctions are necessary to ensure that all parties to a conflict observe at least the substantive provisions of the Civilian Convention, whether or not these parties have acceded to, or have standing to accede to the convention.

Regardless of the moral obligation which nations have to ensure compliance with the humanitarian principles of the Civilian Convention, the general terms used in Article 1 are not explicit enough to ensure that states not directly involved will actually intervene to assure compliance. In fact the experience in Viet Nam, the Middle East and in Korea has proven just the opposite. The mass murders at Hue points out an area in the Civilian Convention which requires some clarification, with specific obligations spelled out. At the present time however, it is suggested that even if the Civilian Convention provided a sanctioning process, it is unlikely that the sanctions would be applied to the Viet Cong or other such guerrilla organizations, in the absence of provisions specifically making such organizations subject not only to the substantive provisions of the convention, but, also to the sanctions for their breach.

(2) Acts directed toward Civilians by the North Vietnamese Regular Military Units.

Although the North Vietnamese have had troops in South Viet Nam for several years, it is only within the past four months, since April, 1972, that North Viet Nam has "occupied" a defined area in South Viet Nam for any period of time. The manner in which the North Vietnamese have treated civilians in the occupied area cannot be determined until the North Vietnamese are forced out of the currently occupied areas. At least one account concerning the conduct of the North Vietnamese has come to light as the result of South Vietnamese airborne troops recapturing the village Haixuan, a few miles south of Quantri City. On this occasion, the North Vietnamese formed a "defense force" of boys and girls between the ages of 17 and 21. These people were armed by the North Vietnamese with captured M-16 rifles, given minimal training and placed under the control of North Vietnamese officers. When the South Vietnamese counter-attacked the North Vietnamese withdrew, taking the newly formed militia with them.¹⁶⁷

Article 51 of the Civilian Convention prohibits an occupying power from compelling protected persons to serve in either its armed or auxiliary forces, and from exerting pressure or promulgating propaganda aimed at securing voluntary enlistment.¹⁶⁸ North Viet Nam then has clearly violated this article of the Civilian Convention.

As previously noted, the extent of North Viet Nam's violations will not be known until the North Vietnamese troops are repelled. However, some indication of what might be expected may be gleaned from the activity of the Viet Cong at Hue, the North Vietnamese conduct in Haixuan (conscripting the civilian population), and the general attitude of the North Vietnamese toward civilians in the conflict area. Capt. Harold Moffett, a U.S. Adviser at Anloc has stated that he saw a communist tank massacre 100 women and children inside a church at Anloc. He further reported that later in the day North Vietnamese artillery shelled a hospital, killing all of its occupants.¹⁶⁹ An observation such as that made by Captain Moffett could be dismissed as just one of those misfortunes bound to happen in a war if it were not for other information indicating that direct attacks against civilians is an integral part of the North Vietnamese strategy. An interview with two colonels who defected from the North Vietnamese Army during the Tet Offensive in 1968 illustrates the attitude of the North Vietnamese military toward civilians.

"Both men...stated that if they had massacred civilians even needlessly, they would not have been punished by their superiors. Should the bloodshed subsequently be judged unnecessary, or even damaging to the communist cause, they would have had to confess that their judgment had been faulty, and promise to make efforts to improve their understanding; but they would have received no punishment. If, on the other hand, they had avoided a massacre of civilians for humanitarian reasons and thereby failed to accomplish their mission, they would...have risked serious punishment."¹⁷⁰

The attitude portrayed in the several foregoing instances is one of total disregard for the Geneva Conventions and the internationally accepted rules of war. They may give some indication of what will be disclosed when the North Vietnamese are forced out of South Viet Nam. At this stage of the hostilities, the uncertainty as to exactly what is happening behind the enemy lines highlights the need for an impartial inspection team at the site of the conflict.

North Viet Nam has acceded to the Geneva Conventions, including the Civilian Convention, with two reservations which are concerned only with procedural, not substantive matters, and are not pertinent within the context of this thesis.¹⁷¹ North Viet Nam might maintain that the Civilian Convention is not applicable because the Geneva Accords divided Viet Nam into two zones rather than two countries and there can be no occupation of a state's own territory. Regardless of what was contemplated by the 1954 Geneva Accords, Viet Nam has in fact over the past eighteen years functioned as two states, one in the North and one in the South. The de facto situation, even if it could be maintained that it has not ripened into a de jure separation of the original state of Viet Nam, would establish that North Viet Nam is occupying territory in South Viet Nam which does not belong to North Viet Nam since the Geneva Accords have not been abrogated. The Convention then, is applicable in the Viet Nam conflict as it is being conducted in South Viet Nam.

(3) Acts Directed towards Civilians by South Vietnamese and American troops.

(a) South Vietnamese troops

The South Vietnamese are currently fighting in their own territory, and have not at any time, occupied any territory in North Viet Nam. Conduct toward its own civilian inhabitants in South Viet Nam does not come within the Civilian Convention.

(b) U. S. Troops

The United States forces participating in the Vietnamese conflict are there pursuant to an obligation of the Southeast Asia Collective Defense Treaty,¹⁷² and at the invitation of the South Vietnamese government. It is thus difficult to envision how the U.S. could be considered an Occupying Power in South Viet Nam. Nonetheless the U.S. would seem to be complying with the substantive provisions of the Civilian Convention in those areas in which it operates.¹⁷³ The My Lai affair involving Lt. Calley and other military personnel who were tried by General Court-Martial,¹⁷⁴ and other isolated incidents such as Sgt. Bumgarner's general court-martial for killing three Vietnamese males while on a combat mission,¹⁷⁵ are indicative of the concern by both command and the general public that U.S. troops conduct themselves in accordance with the rules of war and the Geneva Conventions. This attitude is in stark contrast to that of the North Vietnamese, as revealed by the two colonels who would not be punished if they killed civilians unnecessarily, but would be severely punished if they failed to kill civilians in circumstances in which their death could benefit the communists.¹⁷⁶ Although there have been violations of the Civilian Convention by U.S. military personnel, these offenses were known, and the evidence could be obtained, have by and large been followed by courts-martial proceedings against those responsible for the offenses. It has been stated that the U. S. has probably done more to acquaint its troops with the Geneva Conventions, and to ensure compliance with them, than has any other country.¹⁷⁷

d. Violations of the Civilian Conventions.

The foregoing discussion has illustrated that South Viet Nam could not violate the Civilian Convention within its own boundaries. No charges of violations of the Civilian Convention have thus been made against South

Viet Nam. There have been "grave breaches" of the provisions of the Civilian Convention by U. S. troops, (assuming it is applicable to U.S. troops in South Viet Nam). However, these breaches have, where possible, been punished pursuant to Article 146 of the Convention,¹⁷⁸ although the Convention itself would not seem to apply to the U. S. in South Viet Nam. The U. S. is thus acting in accordance with the principles set down in the Convention, and would appear to be discharging its international obligations.

The Viet Cong however have committed serious breaches of the Convention, and though the Civilian Convention itself is not directly applicable to them, the international rules enunciated therein are applicable. The Geneva Conventions do not make adequate provision for this situation and there is thus a need to draft provisions which would include such units, keeping in mind that the purpose of such provisions is to protect non-combatant civilians.

The North Vietnamese on the other hand have committed at least some breaches of the Civilian Convention by conscripting the civilian population in occupied areas. The extent of their violations will not be known for some time, but past experience indicates that serious breaches either have taken place or are taking place.

B. Captured Combatants

In an armed conflict conducted on a large scale, prisoners are almost invariably taken by both sides. These prisoners may vary in their relation to the hostilities from individual terrorists whose targets have been non-military objectives, to guerrillas who may or may not meet all the requirements to be recognized as a legitimate combatant under the POW Convention, to members of the regular armed forces of parties to the conflict. This section will be primarily concerned with the treatment accorded personnel who are members of the regular armed forces of parties to the conflict, although some

reference will be made on occasion to personnel who come within the categories of terrorists and guerrillas.

1. Arab-Israeli Conflict

In the Arab-Israeli conflict, the treatment accorded guerrillas and regular armed forces by Israel is in marked contrast to the failure to observe some portions of the Civilian Convention. The International Red Cross has repeatedly reported that as regards Civilian and Military prisoners, both the Arabs and Israelis would seem to be in compliance with the provisions of the Civilian and POW Conventions. The Red Cross has arranged for relatives to visit Arab prisoners,¹⁷⁹ has been permitted to talk in private with prisoners,¹⁸⁰ and has generally been permitted to conduct activity on behalf of the prisoners consistent with the Geneva Conventions.¹⁸¹ These activities by the Red Cross would indicate that both sides are treating their prisoners in a manner consistent with the provisions of the Convention, POW or Civilian, which is applicable to them. If in fact there have been violations of the Geneva Conventions respecting civilian and military prisoners, the reports of the International Red Cross would seem to indicate that such violations are not of such significance as to meet the requirements of this paper, and accordingly will not be further considered in this context.

2. Vietnamese Conflict

The first American military man was captured by North Viet Nam in 1964.¹⁸² Since that time, it has been established through North Viet Nam's propaganda statements and through letters mailed by American prisoners, that North Viet Nam holds captive something in excess of 350 Americans.¹⁸³ Additionally it is believed that North Viet Nam now holds or has held many Americans not included in that number.¹⁸⁴ During the war, which has been conducted mostly in South Viet Nam, more than 8,000 North Vietnamese and 30,000 National

Liberation Front personnel have been captured, primarily by United States and South Vietnamese forces. Those captives are being held as prisoners of war in South Vietnamese prisoner of war camps.¹⁸⁵ The capture of personnel by both sides has given rise to various claims and counter-claims by each side as to what treatment has been and should be accorded these personnel. Of import is the fact that North Viet Nam, the United States and South Viet Nam are all signatories of the Geneva Convention Relative to the Treatment of Prisoners of War.¹⁸⁶ The United States claims against North Viet Nam concern alleged violations of the POW Convention by that country. In turn North Viet Nam asserts various claims as to why the prisoners held in that country are not entitled to prisoner of war status. Although neither North Viet Nam nor the National Liberation Front has made any claims that their respective personnel have been improperly treated following their capture,¹⁸⁷ such claims have been raised in the U.S. mass media,¹⁸⁸ and by various groups within the United States which either support the North Vietnamese military position toward South Viet Nam, or are strongly opposed to the United States assisting South Viet Nam, or both.¹⁸⁹

a. Claims by the United States

The basic United States claim is that United States military personnel captured by North Viet Nam are prisoners of war within the meaning of Article 4 of the POW Convention. They are therefore entitled to treatment in accordance with the provisions of that Convention.¹⁹⁰ There follow numerous assertions of specific violations of various articles of the POW Convention.

1. Refusal to exchange sick and wounded prisoners.¹⁹¹
2. Prisoners paraded before the general population.¹⁹²
3. Inadequate food.¹⁹³
4. No inspection of prisoners and prison facilities.¹⁹⁴

5. Inadequate medical care.¹⁹⁵
6. Physical torture of prisoners.¹⁹⁶
7. Refusal to release an official list of prisoners.¹⁹⁷
8. Severe restrictions on prisoners writing and receiving letters and packages.¹⁹⁸

While there are other charges of maltreatment of prisoners by North Viet Nam, the foregoing are sufficient to reflect the nature of these claims, and the general basis for the United States assertion that North Viet Nam is in violation of the POW Convention.

b. Claims of North Viet Nam

North Viet Nam maintains that because the United States has not formally declared war on North Viet Nam, its air attacks on North Viet Nam are "war crimes" and the personnel who participated in those attacks are war criminals.¹⁹⁹ North Viet Nam further points out that its acceptance of the POW Convention was with reservations as to Article 85 of the Convention. This reservation states, "... (P)ersons of war prosecuted and convicted of war crimes, or for crimes against humanity... shall not benefit from the present Convention, as specified in Article 85."²⁰⁰

c. Claims of maltreatment of prisoners of war taken by the United States and South Viet Nam.

No allegations of mistreatment of captured North Vietnamese military personnel have ever been made by the North Vietnamese.²⁰¹ However, as previously noted numerous allegations have been made in the U.S. news media, and by organizations who are either in accord with the goals of North Viet Nam, or are opposed to the role of the United States in South Viet Nam. For the most part these charges stem from means used by the United States and South Vietnamese troops to interrogate prisoners for intelligence purposes. These reports do not purport to distinguish between treatment of members of

the Viet Cong (National Liberation Front) operating as guerrilla units or terrorists, and that accorded North Vietnamese soldiers. So far as these claims are concerned, no distinction will be made between these two groups.

1. "There appears to be little doubt that at least well into 1966 South Vietnamese combat troops regularly mistreated captured enemy personnel...in order to obtain intelligence information..."²⁰²
2. Larry Rottman, volunteer coordinator for veterans against the war, stated before the Subcommittee on National Security Policy and Scientific Developments on April 20, 1971, that he personally knew of the following types of mistreatment of prisoners of war taken by American Personnel.²⁰³
 - a. Water torture.
 - b. Pole torture.
 - c. Half-a-chopper ride
 - d. Shooting persons attempting to surrender.
3. One highly publicized incident in the U.S. mass media was the confinement of prisoners of war in 'tiger cages' at Con Son.²⁰⁴
4. Various individual incidents were described by Viet Nam veterans in a paper compiled by the "National Veterans' Inquiry into War Crimes": a year-end report.²⁰⁵

It would appear that mistreatment of North Vietnamese regular troops and/or Viet Cong personnel has occurred during the war in Viet Nam, and that U.S. military personnel were directly or indirectly involved in such incidents.

d. Applicability of the POW Convention in Viet Nam

The nature of the conflict up until April, 1972, when North Viet Nam openly sent its armies, not already located in South Viet Nam, across the demarcation line between North and South Viet Nam, was one in which North Viet Nam maintained that it was not at war and therefore the POW Convention was not applicable. Even with the invasion, there is no indication that North Viet Nam has changed its position toward U.S. Prisoners of War. The circumstances of North Viet Nam's participation in the war prior to April 1972 was such that inquiry into whether the POW Convention was applicable is necessary. If under the circumstances, the Convention was not applicable, then those sanctions

which might be applied to secure compliance with its provisions is a moot question.

Article 2 of the Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War states in part, "... (T)he present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."²⁰⁶ There is irrefutable empirical evidence that as between North Viet Nam, South Viet Nam and the United States, there exists an "armed conflict", whether or not the Viet Cong is considered a North Vietnamese agency for this purpose. All three participants have deployed large numbers of combat troops that regularly engage in military operations with consequent loss of life, destruction of property, and taking of prisoners. These three participants are all signatories of the POW Convention. It is thus apparent that these three participants are bound by the provisions of the Geneva Conventions if they are applicable in this conflict. The National Liberation Front has not acceded to the POW Convention, and has stated that since it did not participate in the four Geneva Conventions, it was not bound by them.²⁰⁷ A consideration of whether guerrilla organizations are required by the Geneva Conventions to treat prisoners of war in accordance with the POW Convention is beyond the scope of this article. It is noted however, that the substantive provisions of the conventions express general rules of international law binding on all combatants regardless of any treaty.

(1) Necessity for Declaration of War

North Viet Nam's publicly announced reason for not complying with the provisions of the POW Convention, is that there has been no "declaration of war", hence the POW Convention is not applicable.²⁰⁸ There has not been a formal declaration of war by the United States against North Viet Nam.

However, any view taken of the position of the United States in Viet Nam must certainly concede that there is an "armed conflict", the second condition under which the provisions of the POW Convention becomes applicable. There has never been any contention that the U. S. Military personnel held by North Viet Nam were operating other than within their respective military services and under the direction of the United States government.²⁰⁹ Regardless of how U. S. participation is labeled, be it aggression or the collective self defense of South Viet Nam, or by some other term, there is an "armed conflict" involving combat forces from three signatories of the POW Convention. In this respect, the POW Convention is applicable.

(2) Is the Armed Conflict of an International Character

Article 3 of the POW Convention provides that:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties ... (p)ersons taking no active part in the hostilities, including ... those placed hors de combat by ... detention ... shall ... be treated humanely..."²¹⁰

Although Article 3 prohibits "violence to life and person", "taking hostages", "humiliating and degrading treatment", and provides for care for the sick and wounded, it does not require inspection of detention facilities by an impartial organization or neutral country, although "An impartial humanitarian body, such as the International Committee of the Red Cross may offer its services to the Parties to the conflict."²¹¹ If the Viet Nam conflict is properly categorized as not of an international character, then it would seem that Article 3 not Article 2 of the POW Convention would be applicable. Although there have been some violations even of the lesser standards established by Article 3, the treatment of American prisoners held by North Viet Nam is not grossly contrary to the explicit provisions of that Article. The limited provisions of Article 3 merely establish minimum standards under the

circumstances in which it is applicable.²¹² Implicit in its language however, would seem to be a higher degree of "humane" treatment than has heretofore been demonstrated by the North Vietnamese.

There has apparently never been an official declaration by the North Vietnamese that the POW Convention is not applicable because the conflict was not an international one. It is appropriate however, to look to their conduct, actions, and related statements, to determine just how North Viet Nam might view the conflict for some purposes. The Geneva Accords of 1954 did not purport to divide Viet Nam into two countries. It did establish a buffer-zone at the 17th parallel, and thus divided the country into two zones, with the intent of reunifying those two zones at a future date.²¹³ North Viet Nam's Constitution which was revised in 1960, asserts that Viet Nam is but one nation.²¹⁴ If that view is accepted, then the conflict would not seem to be of an international character. In its dealings with the International Committee of the Red Cross, North Viet Nam has stated, "...the captured American pilots are treated humanely..."²¹⁵ and "...captured pilots are well treated."²¹⁶ Again when describing the treatment accorded the Americans held in North Viet Nam, Minister Xuan Thuy, Chief of the Delegation of the Government of the Democratic Republic of Vietnam, at the 100th plenary session of the Paris Conference on Viet Nam on January 21, 1971, stated, "... (A) lthough the American pilots were captured in the act of committing crimes when bombing the Democratic Republic of Viet Nam, our government has treated them with leniency and humanity...."²¹⁷ The terms "humanity", "well-treated" and "humanely" may have been advisedly used by North Vietnam. It would seem that a more convincing argument for refusing to treat captured Americans as prisoners of war can be made on the basis that the conflict is not of an international character, than can be made on the basis that the United States

has not declared war on North Viet Nam.

Regardless of what was intended, the partitioning of Viet Nam has resulted in the creation of two international entities where before there was only one. Each entity carries on its own trade, has its own government within well defined territorial boundaries, has its own police, armies, diplomatic relations and for all intents and purposes has all the characteristics of a separate nation. Under these circumstances, an armed conflict between North and South Viet Nam alone should be of an international character. With the addition of American, Australian, New Zealand, Phillippine, Thialand and South Korean combat troops, the conflict becomes peculiarly international in fact. There is precedent for applying the POW Convention to a situation such as that which exists in Viet Nam. The intervention in the conflict involving North and South Korea, although carried out under the auspices of the United Nations, was quite similar to that in Viet Nam. In that conflict the Communist forces insisted that the provisions of the POW Convention were applicable, even though they did not themselves comply with those provisions.²¹⁸ Although one party to a conflict cannot be prevented from denying the conflict's international character, that party cannot for international purposes, in the face of empirical evidence to the contrary, so characterize a conflict merely because such characterization would best serve its ends.

It follows that Article 2 of the POW Convention is applicable, and that the American and North Vietnamese captives are prisoners of war.

e. Do the substantiated claims violate the POW Convention.

(1) Claims concerning prisoners taken by the United States and South Viet Nam

Essentially all of the claims of mistreatment of prisoners by U.S. and South Vietnamese troops involve various means of torture to obtain information.²¹⁹

Another claim is the occasional refusal of troops in the field to take prisoners, the election being to kill them.²²⁰ Each of these allegations are clearly violations of the POW Convention.

An additional highly publicized claim was the confinement of prisoners of war in the "Tiger Cages" at Con Son. This incident was publicized by both the mass news media and other writers.²²¹ If, in fact, prisoners of war had been confined in "windowless pits" under the circumstances indicated, it would clearly be a violation of the Geneva Convention.²²² However, subsequent investigation has disclosed that the persons confined in the "Tiger Cages" at Con Son were not prisoners of war. Indeed the "Tiger Cages" themselves were not "pits" as advertised, but rather two story buildings having bars in place of a ceiling. Although there were 29 prisoners of war at Con Son, none of them were in "tiger cages" and each had been tried and convicted of felonies committed in the ordinary prison camps, and subsequently transferred to Con Son.²²³ In this regard, South Viet Nam was not in violation of the POW Convention.

(2) Claims Concerning prisoners taken by North Viet Nam

From the outset of direct involvement by the United States in the Viet Nam war, the North Vietnamese have made it clear that they would not apply the provisions of the POW Convention to captured Americans.²²⁴ The information which has come to light concerning the actual treatment of these personnel, as well as the refusal to put into effect the more formal provisions providing for impartial inspection of the facilities and prisoners,²²⁵ merely emphasize the stated policy. A partial list of the more pertinent actions and the Articles of the POW Convention violated is set forth below:

<u>Conduct</u>	<u>Article Violated</u>
Refusal to exchange sick and wounded prisoners	Article 109
Prisoners paraded before the General population	Article 13
Food inadequate in quantity and quality	Article 26
Inadequate medical care	Article 30
Physical torture	Articles 13 and 130
Refusal to provide an official list of prisoners	Article 122
Severe and vacillating restrictions on writing letters	Article 71

(3) Effect of North Viet Nam's reservations to the POW Convention

North Viet Nam's accession to the POW Convention was made with several reservations.²²⁶ One of these reservations was to Article 85 which provides that "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention."²²⁷ North Viet Nam has declared (as have essentially all of the communist bloc nations) that "prisoners of war prosecuted and convicted for war crimes or for crimes against humanity...shall not benefit from the...Convention..."²²⁸ Although, North Viet Nam claims that the American prisoners are war criminals, none have been tried and convicted. It is not necessary to delve into whether the bombing of North Viet Nam constitutes a war crime attributable to each participating pilot and air crewman, or to question whether such reservation is legal from an international law viewpoint. It should be sufficient that the reservation itself specifies that each prisoner of war be tried and convicted of a war crime to no longer be entitled to the protection of the Convention. As noted earlier in this discussion,

essentially all of the communist bloc countries inserted an exception to Article 85. There was little difference in their wording, and it is apparent that each exception contemplates the same effect as do the exceptions taken by each of the other communist countries. In response to an inquiry from the Swiss Government on this matter, the Ministry of Foreign Affairs of the USSR, forwarded a note which, in explanation of the exception to Article 85, stated in part, "...prisoners of war who, under the Law of the USSR, have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts."²²⁹ It is thus clear that the reservation itself does not become applicable until after a trial and conviction.

f. Violations of the POW Convention

It is conceded that the South Vietnamese army has violated the provisions of the POW Convention, at least in respect to Viet Cong guerrillas and terrorists, and that if the United States troops did not themselves violate the provisions of the convention, there was at least some complicity in the South Vietnamese violations involving prisoners taken by the U.S. and turned over to South Viet Nam. As to prisoners taken by the South Vietnamese, however, the United States has no legal obligation to assure that South Viet Nam complies with the convention.²³⁰ In any event, upon discovery that violations of the POW Convention were taking place, particularly by South Vietnamese troops, the United States appears to have corrected the situation so that violations by South Vietnamese and United States troops are minimized. Most violations of the convention were committed by South Vietnamese in the field after the American troops turned captives over to South Vietnamese troops. These violations were largely stopped by the American's refusing to turn prisoners over to the South Vietnamese below the division level for delivery

directly to the POW camps.²³¹ There are doubtless still isolated instances of violations of the POW Convention by allied troops, but such conduct has been reduced to a bare minimum and certainly is not part of an official policy by the United States.²³²

By contrast, North Viet Nam which has long been in violation of the POW Convention, continues to do so as a matter of official policy.

II. Problems peculiar to current Conflict Arenas

It should come as no great shock that most wars over the past few years have not been fought under such conditions as to permit the employment of the classic principles espoused by General von Clausewitz.²³³ The so-called wars of national liberation do not employ the classic concepts of infantry and cavalry maneuvering across open fields to the beat of drums at high noon on a cloudless spring day. With the introduction of large scale guerrilla and terrorist activity as well as the concept of "total war" involving entire populations, has come a blurring of many traditional concepts within the conflict arena. Questions which currently confront the military commander and established governments are such matters as; Where are the combat zones? How can you distinguish combatants from non-combatants? What are legal and what are illegal means of conducting warfare? Who is responsible, morally and legally, for injury to non-combatant civilians? Each of these problems could in themselves be the subject of a comprehensive dissertation. It is beyond the scope of this article to even fully define the problems involved in the foregoing questions. They will however, be discussed in a general manner to illustrate the type of contemporary settings to which the POW and Civilian Conventions must be adapted.

A. Where is the Combat Zone?

One of the more difficult problems confronting those officials who must counter guerrilla activity, is what areas constitute the combat zones. This same question is posed in modern day conventional warfare because of the dependence of troops in the field on the industrial capacity of their respective states, or the industrial capacity of other states which supply arms to them. The question is further complicated when guerrillas are permitted to operate out of states adjoining the state under attack, as was the case in the Arab-Israeli conflict for several years. Since this article will consider these problems in only a cursory manner, they may be considered under two headings; Those states directly involved in the conflict, and those states indirectly involved in the conflict.

1. States directly involved in the Conflict.

Where two or more states are directly involved in conventional warfare, the traditional concept of the combat area being the field or area in which the contesting armies meet, would at first seem plausible. However the realities of modern day conventional warfare employing large armies which require immense quantities of war materials, involves essentially the entire economy in the war effort.²³⁴ As illustrated in World War II by the German air attacks on industry in England and other allied states, and the attacks by the United States and its allies on the industrial base of Germany, a new dimension has been added to what may legitimately be called the battle arena. That dimension includes the industrial and economic base. This dimension was not recognized simply because in a given war the respective states attacked their enemies' industry, but rather because the military necessity for such attacks was recognized and accepted by both sides. It may thus be surmised that essentially the entire territory of a state actively engaged in conventional warfare may be described as a conflict arena.

A more difficult problem confronts a state when neighboring states permit guerrillas to conduct military or terrorist attacks from their territory, with or without the active assistance of the harboring states. In this situation the harboring state may be professing neutrality while actively working with the guerrillas, or the neighboring state may truly be unable from a military standpoint, to prevent the guerrillas from using its territory as a base of operations. Certainly in the instance where the harboring state assists the guerrillas, or fails to take any meaningful action to halt the activity, it is in violation of Article 4 of the 1907 Hague Convention on the Rights and Duties of Neutral Powers.²³⁵ In either instance, whether the harboring state is either unwilling or unable to stop the attacks originating in its territory, the state against which the attacks are being launched would seem to be entitled to attack the guerrillas at their home base, thus spreading the active conflict arena from its own into neighbors boundaries. This has long been the situation in the Arab-Israeli conflict.²³⁶ The same principle would seem to be applicable in Laos and Thailand where the United States daily launches air attacks against North Viet Nam, and in fact the principle has been applied by both South Viet Nam and the United States in conducting operations against North Vietnamese supply and regrouping centers in Cambodia and Laos. Justification for enlarging the conflict arena to include a portion of the territory of a supposedly neutral state (disregarding the risk of open warfare with that state) may be justified by the principle that "Belligerents may not use neutral territory as a base for military expeditions or military enterprises against the enemy."²³⁷ Where the neutral state either cannot or will not stop the activity, it is only reasonable that the state under attack by the guerrillas should be entitled to take appropriate action.

A third difficulty confronting a state within whose boundaries guerrilla

activity is being conducted, is determining where the guerrillas are located. This problem is greatly complicated because of the new standard guerrilla tactic of dressing as does the population in a given area.²³⁸ The guerrilla activity becomes even more difficult to isolate where guerrillas murder the local populace who might assist the government in locating guerrillas, as in South Viet Nam,²³⁹ and seek to alienate the population from the legally constituted government through terror tactics.²⁴⁰ The difficulty here is determining which portion of a state's own territory is beginning to fall, or has fallen under enemy control. When the guerrillas cannot be isolated, the entire territory, or a large portion of it thus becomes a conflict arena. This of course is a standard tactic, and one of the primary goals of guerrilla organizations.²⁴¹

From the foregoing discussion it is apparent that war in the contemporary world has greatly broadened the areas which may properly be considered as conflict arenas. With this broadening of the arena, more civilians, not directly engaged in the fighting in the sense that they carry a gun, are at the focal point of pitched battles, air attacks, terrorist activities, and advancing armies. Since there appears to be little chance of narrowing the combat arena in the foreseeable future, the need for some means of enforcing the Civilian Convention and the rules of war becomes more acute.

2. States not directly involved in the conflict.

States not actively involved in hostilities in the sense that attacks are being launched from within their borders, may nevertheless become involved to one degree or another through other means. For instance supplies may be transported across its territory or even directly provided to a belligerent. Since a neutral state is not obliged to intervene to stop such shipments of supplies,²⁴² these circumstances could enlarge the conflict arena as the

state against which the supplies are being used seeks to halt their flow.

Another circumstance in which a state may become indirectly involved, is when members of a guerrilla organization attempt to extort funds through aircraft hijacking, robbery or other criminal activity. These kinds of activity however would not ordinarily tend to expand the geographical area of conflict as such and therefore will not be further considered.

B. Distinguishing Combatants from Non-Combatants.

1. Members of Regular Military Units

Members of regular military units are in almost all circumstances recognizable as such. Such recognition is important since under the POW Convention, members of regular armed forces, and guerrillas who meet the four requirements of (1) being commanded by a person responsible for his subordinates, (2) wearing a fixed distinctive sign, (3) openly carrying arms, and (4) conducting operations in accordance with the laws of war, are entitled to be treated as prisoners-of-war under the POW Convention.²⁴³ In addition to determining who is entitled to treatment as prisoners-of-war, these requirements also serve to protect the civilian population from being mistaken for enemy troops. Although regular military units do not wear full dress uniform on the field, some sort of uniform, including camouflaged uniforms with accompanying arms serves to distinguish regular units from the civilian population.

2. Guerrillas

It is necessary to distinguish guerrillas from civilians and from terrorists for different reasons. The distinction from terrorists becomes necessary after capture to determine whether the individual is to be treated as a common criminal under the municipal criminal code, or is to be accorded treatment as a prisoner-of-war. The distinction from civilian non-combatants

is necessary before capture, in order to determine if the individual is a combatant, subject to attack, or a civilian or group of civilian non-combatants immune from direct attack.

a. Distinguished from terrorists.

During the period since World War II, there has been a general blurring of the distinction between terrorist activity and activity by units which can legitimately be called guerrillas. This blurring has resulted in large measure from the same units conducting both classic guerrilla activity, and acts which can only be described as terrorist actions, as part of a unified strategy.²⁴⁴ In considerable measure, the practice of wearing a distinctive sign and carrying arms openly seems to be currently noted more by its abuse than compliance. Is there another means of distinguishing terrorists from guerrillas? It would seem that a logical means is to look to the object of the attack. Terrorists tend to use force indiscriminately against both the civilian community and military objects. Guerrillas on the other hand tend to think in terms of military objectives and their attacks are directed toward such objectives.²⁴⁵ As a practical matter, terrorist activity and guerrilla activity tend to blend into one another, especially in the early stages of conflict when efforts are being made to organize guerrilla bands. At this stage a lone terrorist may be used to create a sensational spectacle and show of force,²⁴⁶ perhaps through detonating explosives in public areas. It is suggested that where a government must decide whether to accord prisoner-of-war status to a captured irregular belligerent, a rule of thumb which may be used to determine whether the individual is a guerrilla or terrorist, is to look to the object of attack. This is not however, meant to suggest that the requirements of legitimate belligerents, as specified in the POW Convention, be ignored or even lessened, but rather to point out that in practice some

governments have been reasonably lenient in granting such status to prisoners who did not meet the requirements of the Convention,²⁴⁷ and that the objects of attack in those instances afford a reasonable alternate guideline.

b. Distinguishing Guerrillas from Civilian Non-Combatants

It is necessary to distinguish guerrillas from terrorists in order to determine whether the individuals involved should be accorded treatment as prisoners-of-war. That need is therefore directed toward the protection of legitimate belligerents. There is a more immediate and urgent reason for distinguishing guerrillas from civilian non-combatants. This need arises in combat arenas when government forces are confronted with guerrilla activity. From a guerrilla's point of view, compliance with the four requirements especially those requiring that he wear a distinctive sign and carry arms openly, destroys some of his effectiveness and makes him more likely to be discovered and attacked. These requirements however were not designed to even the odds in a game, or give the government a little edge it would not otherwise have. They were intended to, and where observed, do in fact afford some minimal protection to the civilian non-combatant population. The primary purpose of the requirements is to distinguish guerrillas from the civilian population and thus reduce the instances in which civilians are taken under fire as guerrillas.²⁴⁸

In the 1971 Conference of Government experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, most of the experts advocated abandoning the necessity for guerrillas to wear a fixed distinctive sign.²⁴⁹ The requirement suggested by some representatives as a substitute was that the combatants openly carry on the struggle, meaning that they not try to hide their combatant status. This could be done either by carrying arms openly or by wearing a distinctive sign.²⁵⁰ In addition to

proposals to lessen the requirements for legitimate guerrilla combatants, there are also proposals for more lenient treatment of terrorists, inspired by professed sympathies for "liberation" movements.²⁵¹ This proposed broadening of the spectrum of protected persons qualifying as guerrillas on the one hand, and granting more lenient treatment to terrorists on the other, is likely inspired by the Communist attitude toward guerrillas engaged in activity against a non-communist government, and the distinction between so-called "just" and "unjust" wars, as defined in communist ideology.²⁵² This factor is one which will require consideration in any proposed means to enforce the present POW and Civilian Conventions. Until the ground rules for legitimate combatants are enforced, the persons most directly affected, are not the combatants, but rather non-combatant civilians. Soldiers are human beings and have no more desire to be killed than does anyone else. Nor are the objective concepts of the Geneva Conventions likely to have much relevance to his actions when he is being subjected to hostile fire from individuals he cannot distinguish from the local population.²⁵³ He is even less likely to be impressed with the humanitarian goals of the conventions, when empirical evidence convinces him that part of the civilian population becomes night-time guerrillas and terrorists.²⁵⁴ He thus becomes less inclined to await positive identification of guerrillas when confronted with unknown persons in civilian dress, and is more likely to fire at civilians who are in fact non-combatants. Even this however serves to further the purpose of guerrillas, because it tends to alienate the civilian population from the government, and thus either enlist their direct or tacit support for the guerrillas. The government troops on the other hand are confronted with a situation in which persons involved in guerrilla movements are urged to wear civilian clothing and carry concealed arms so as to be indistinguishable from the civilian

population,²⁵⁵ while the government troops are publicly faulted for any error in mistaking civilians for guerrillas, and placed in mortal personal danger if they mistake guerrillas for civilians. The government troops reaction is likely to be, if he must err, to err on the side which places him in less immediate physical danger.

It should be concluded that the four requirements of Article 4 of the POW Convention,²⁵⁶ are necessary to protect the civilian population. Further relaxation of these rules, while appearing to be humane in the treatment accorded guerrillas and terrorists, can only result in increased casualties among non-combatant civilians, and thus in the long haul prove to be more inhumane.²⁵⁷ If there must be harsh consequences to human beings involved in a conflict, the consequences should fall on those who are combatants, and not on those individuals among whom the conflict has raged against their wishes. It is partly to enforce the current rules, designed to accomplish this purpose, that sanctions are needed.

C. Distinguishing legal from illegal means of warfare.

In general the distinction of legal from illegal combat activity may be discussed under three headings; legal combatants, means of attack, and objects of attack. The first of these three has been discussed in the preceeding paragraphs. The problems discussed in the following paragraphs therefore deal with the latter two matters.

1. Means of attack.

The 1907 Hague convention governing Land Warfare provides that "The right of belligerents to adopt means of injuring the enemy is not unlimited."²⁵⁸ It was repeatedly declared at the Nuremberg trials following World War II, that the principles stated in the Hague Conventions were recognized by all civilized nations, and as such were declatory of the customary laws of war.²⁵⁹ It

follows then that war crimes are violations of international law, and therefore punishable regardless of whether there is any municipal law violation.²⁶⁰

Having established that individuals who are responsible for violations of the laws of war are subject to punishment by the world community, it is then interesting to note that many of the rules governing the types of force which may be used, as specified by treaty, are so general that they are no longer applicable or may technically be avoided in the contemporary world. In the last analysis, it may be concluded that the principles are what will have to govern, rather than set rules prohibiting particular weapons. The principles involved which have been stated as constituting the "...'basic principles of the laws of war'..."²⁶¹ are "military necessity, humanity and chivalry...",²⁶² although it is offered that chivalry has for the greater part faded from the scene. Military necessity allows belligerents to use only such means and degree of force as is absolutely required to win, with the least loss of time, life, and property.²⁶³ Humanity prohibits the use of force not necessary for the purpose of the war,²⁶⁴ while chivalry forbids resort to "dishonorable (treacherous) means."²⁶⁵ It has been asserted that Article 1 of all four Geneva Conventions which states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." (emphasis added), has generally proscribed the rule of military necessity.²⁶⁶ It is submitted that such rationale if followed would lead to further disregard of the Conventions. When a state is confronted with circumstances on which its very existence may turn, the recognized rule of 'military necessity' will prevail over humane considerations. It is thus better to have imperfect rules which can in the real world be followed, than to have highly idealistic rules, which in practice will be ignored.²⁶⁷

It has been stated that total destruction can rarely be justified.²⁶⁸ So far as this relates to means of attack which will unnecessarily kill civilians, this assertion would seem to be correct. Following this rationale it has been urged on numerous occasions that the use of nuclear weapons is therefore unlawful.²⁶⁹ The most reasoned objection to such weapons would seem to be that because of the magnitude of their power, there can be no selectivity between military and non-military objectives.²⁷⁰ It would seem however, that when a balancing of the cost in human lives and property, would disclose that there will ultimately be less loss if the weapons are used than if not used, as was the decision to use nuclear weapons against Japan in World War II, then the failure to use such weapons, even with the resulting devastation in a given area, would violate the rules requiring use of minimum force and loss of life to gain the objective. The same rationale would seem to apply to chemical warfare. The Geneva Protocol of 1925 which prohibits the use of Gas was prepared in a time before effective non-lethal gases were perfected. The United States however is using tear and nausea gas in Viet Nam against entrenched North Vietnamese troops, and the North Vietnamese have also used tear gas against the South Vietnamese.²⁷¹ The United States rationale for using these gases is that it is possible to "capture enemy soldiers unharmed, and (is) particularly useful in reducing civilian casualties when the enemy has infiltrated into population centers..."²⁷² An analysis of the use of gas, which may technically violate the provisions of the Gas Protocol of 1925, affirms that treaties which are not continually revised to keep pace with technological developments soon lose their effectiveness, and indeed may become counter-productive. The objective of the Gas Protocol following World War I, was to reduce unnecessary casualties from a weapon causing great suffering before death, and permanent damage in many cases when it did not kill.

Yet, the new incapacitating gases such as tear gas and nausea gases do not cause permanent injury and substantially reduce civilian as well as military casualties and property damage well below that which would be incurred if conventional weapons were used. From the viewpoint of minimal destruction of human values, the use of gases would seem to be justified.

It is suggested that within the relatively loose framework bounded on the one side by military necessity and on the other by humane considerations, those weapons which are most effective in accomplishing the objective, with minimal loss of human values should be permissible. It is the human factor which was the purpose of the rules at the outset, and it is that factor which should determine the legality of weapons as new technology emerges in the weapons field.

2. Objects of Attack

"It is evident that acts of terrorism directed against enemy civilian objectives unquestionably represent infractions of the laws of war, regardless of who may be their authors (Whether or not they are legal combatants)."273

The foregoing quotation would seem to summarize the laws of war respecting objects lawfully subject to attack. The use of large scale bombing raids, artillery barrages, and even attacks by individual infantrymen where civilian objectives are hit, can, if not sufficiently related to a genuine military objective be construed as terrorism, or war crimes. It is thus pointed out that such offenses may be committed by regular as well as guerrilla units. However, regardless of whether there are regular or guerrilla units involved, the act constitutes a violation of the laws of war, and again it is the civilians who are trapped with no effective remedy.

D. Responsibility for injury to Civilian Non-Combatants.

When the rules of war, regarding lawful combatants, lawful means of attack, or lawful objects of attack, are not followed, the destruction of human life as well as property is increased beyond that which should be tolerated even in a combat situation. When there is indiscriminate murder of civilians such as that committed by U. S. troops at My Lai,²⁷⁴ or those perpetrated by the Viet Cong at Hue,²⁷⁵ there is no difficulty in assessing responsibility for the crimes. However, when military objectives are deliberately located amidst the non-combatant civilian population, resulting in attacks on the military objective which incidently inflict casualties on non-combatant civilian personell or property, a different problem is posed. It may be conceded that:

"There is ... no reason to differentiate between indiscriminate 'terrorism' by guerrilleros against the population and the equally indiscriminate attacks perpetrated by the air force, artillery or infantry of the regular forces."²⁷⁶

In the cost of human lives, and property, there is no distinction between who fired the shells, or whether the bomb was dropped by a plane or set by a terrorist. Israel recently resumed attacks on villages suspected of being bases for Palestinian guerrillas.²⁷⁷ The attacks, resulting in several civilian casualties were apparently in reprisal for attacks by the Palestinian guerrillas against Israeli civilian housing areas. This incident serves to put in perspective the question of responsibility. For instance, when considering the action of the guerrillas in initially attacking the Israeli housing areas, should the circumstances of how Israel obtained those areas be considered, or should only the fact that the guerrilla attacks were against a civilian objective be weighed? Does it matter that the guerrillas do not have the sophisticated military equipment required to launch attacks against

precise targets? It would seem that the Palestinian guerrillas must lose on both points. If the purpose of the Rules of War are to conserve human resources and protect non-combatant civilians, attacks on civilian objectives, unrelated to an immediate military objective cannot be accepted.²⁷⁸ The method by which Israel obtained the areas on which the guerrilla attacks were launched is immaterial if the sole objective of the guerrilla attack is to create terror. It is accepted as customary international law that individuals not a part of the armed forces cannot be the objects of attack, where such attack is not incidental to military operations.²⁷⁹ However, if the Israeli attack is in reprisal for a violation of the rules of War, it is not illegal even where directed against the civilian population.²⁸⁰ This rule would seem to apply to the recent attacks by Israel, especially if the Guerrillas involved are likely to reside in the villages attacked.

Although Article 28 of the Civilian Convention stating "The presence of a protected person may not be used to render certain points or areas immune from military operations,"²⁸¹ applies only to occupied areas, the principle stated therein would seem to have universal application. The objective is to prohibit the deliberate use of civilians as a shield for legitimate military targets. The extremely effective German anti-aircraft defense in World War II, plus the location of the war industries in heavily populated areas made target area bombing necessary in that war. With this tactic, the planes simply dropped their bombs in the area the military objective was known to be located. The justification for this tactic was that the Germans had taken measures i.e., anti-aircraft defenses, which effectively concealed the targets.²⁸² Doubtless the same rationale can be applied to many of the Palestinian Guerrilla's attacks on Israel, and the Viet Cong attacks on South Viet Nam. The question to be raised in these rocket attacks however, is what chance is

there of successfully hitting the military target? If with the weapons available there is no reasonable expectation of success, as would seem to be the case, then the attacks cannot be justified.²⁸³

Guerrillas present another problem. In present day guerrilla warfare, the guerrillas frequently dress, and are urged by their leaders to dress, as does the civilian populace.²⁸⁴ They then move among the civilian population, and attack both civilian and military targets from that cover. Such conduct would seem to violate the principle enunciated by Article 28 of the Civilian Convention, even though that Article might not be directly applicable.

It may be concluded that where guerrillas attempt to conceal themselves among the civilian populace, or where lawfully (or unlawfully for that matter) constituted governments, attempt to conceal military objectives among the civilian populace, it is the attempt to use the civilian population as cover, rather than the attack on the concealed military objective, which is responsible for civilian casualties and damage to civilian property done in the attack.

The problems discussed in this section (II A through D above) illustrate the type of problem which must be resolved before it is possible to determine against whom sanctions should be taken, and a procedure for making these determinations must thus be encompassed in any sanctioning process. Common to all the problems presented and the circumstances in which they appear, is the position of the civilian populace trapped in the combat arena, with no recourse but to wait out the hostilities and hope for the best.

III. Ineffectiveness of POW and Civilian Geneva Conventions in Many Contemporary circumstances

A. Demonstrated Ineffectiveness

Despite the broad protection afforded non-combatants by the Civilian Convention,²⁸⁵ it has been demonstrated elsewhere in this article that when

there are armed hostilities in the contemporary world, the rights of civilians are given secondary importance to the respective interests of the belligerents. Consequently, in Israel, Arabs have been expelled from occupied territory so that Israel may expropriate the real property for Israelis, while in Viet Nam there has been maiming, murder, and abuse of civilians in an effort to establish a communist base of power in South Viet Nam. Additionally, there has been disregard of the POW Convention by the North Vietnamese, and to a lesser degree by the South Vietnamese. Nor is such disregard for regulations concerning prisoners-of-war and civilians, a recent development. During the second World War, Russia refused to comply with the Convention as it concerned German prisoners,²⁸⁶ and during the Korean War the North Korean and Chinese Communist refused to apply the POW Convention.²⁸⁷

While it is not meant to imply that the provisions of the POW and Civilian Conventions are never followed, it is apparent that the provisions are violated far more often than would be the case if belligerents were making a bona fide effort to comply with their international obligations in this respect.

B. Why do State Signatories of the POW and Civilian Geneva Conventions not comply with its provisions?

Article 129 of the POW Convention and Article 146 of the Civilian Convention imposes an obligation upon contracting states to enact legislation for the punishment of "grave breaches" as defined in the Conventions. Such acts as willful killing, torture and inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of protected persons, and extensive destruction or appropriation of property not justified by military necessity, are among the acts designated as "grave breaches" in the POW and Civilian Conventions.²⁸⁸ Since there is no international criminal court to try war criminals,²⁸⁹ it is apparent that

a belligerent has a duty under Articles 129 and 146 of the POW and Civilian Conventions, respectively, to punish members of its armed forces who commit "grave breaches" of the Conventions.²⁹⁰ The United States fulfills this obligation by making the Commanding Officer of units responsible for illegitimate acts committed by his subordinates, when the acts are by his order, authorization or acquiescence.²⁹¹ Such criminal responsibility of the Commanding Officer does not relieve the actual perpetrator of the offense from his personal responsibility for his actions. It has been repeatedly demonstrated that in fact, the United States enforces these rules.²⁹² On the other hand, it is apparent that a number of other states do not. The question is then raised, why not?

1. Russia's refusal to apply the POW Convention in World War II.

As noted earlier in this article, Russia refused to apply the Geneva Convention to German prisoners-of-war in World War II. The Russian position was that "...any soldier who fell into enemy hands was ipso facto a traitor and deserved no protection from his government..."²⁹³ This position was maintained throughout the war despite its contribution to the death of untold thousands of Russian prisoners-of-war held by the Germans.²⁹⁴ Since Germany did in general comply with the POW Convention respecting American prisoners-of-war, it would appear that Germany applied the Convention on a reciprocal basis. Why would Russia not apply the Convention? The answer would seem to be that by inviting Germany to mistreat the Russians it captured, Russia discouraged its own soldiers from surrendering. This objective of preserving its armies in the field, was given priority over the lives of those Russian soldiers who had been captured and could thus no longer assist in the conflict.

2. North Viet Nam's refusal to apply the POW Convention to American Prisoners-of-War.

In the Vietnamese conflict, North Viet Nam has maintained that since war has not been declared, the POW Convention is not applicable. It has therefore refused to comply with the POW Convention.²⁹⁵ For a country that executed some fifty thousand of its own citizens, at times on an almost indiscriminate basis, in the implementation of a land reform program,²⁹⁶ the violation of the POW Convention in respect to a few hundred American prisoners of war is indeed a minor affair, provided there is some objective to be gained.

When it is considered that there would likely be little if any need to increase men and materials, and indeed there might be a decrease in both, to accord American prisoners-of-war the rights required by the POW Convention, then it becomes apparent that North Viet Nam has some definite purpose in its present course of action. Several possible objectives are present.

The North Vietnamese Constitution provides severe penalties for anyone who opposes the policies of North Viet Nam toward South Viet Nam.²⁹⁷ After years of sending its young men into the South to fight, and being on a wartime footing at home, it is not unreasonable to expect some disillusionment with the war by the North Vietnamese.²⁹⁸ What better object lesson to North Viet Nam's own subjects than the harsh treatment of Americans who have been captured while supporting South Viet Nam. The Americans thus provide an example without alienating the family and friends of North Vietnamese Nationals who might otherwise be punished.

The prolonged confinement of Americans in substandard conditions in North Viet Nam, creates an emotional element in the United States which can unite numerous groups with diverse interests in demanding that whatever steps necessary, including withdrawal from South Viet Nam, be taken to obtain their

release. The North Vietnamese are aware of this and are doubtless counting on internal political pressure to curtail, and eventually terminate the United States' active support for South Viet Nam.²⁹⁹ This is the only rational construction that can be attributed to the statement of the North Vietnamese delegation in Paris which instructed the wives of American captured and missing in action to "go back to the United States and participate in some of the anti-war demonstrations, and some of the activities that would bring pressure on the administration."³⁰⁰

If one accepts as a premise that North Viet Nam hopes to accomplish its military objective against the United States through internal political pressure,³⁰¹ then the probable adverse effects the years of mistreatment of American prisoners if publicly disclosed would have on the North Vietnamese influence within certain anti-war groups in the United States cannot be underestimated.

Part IV of the Geneva Convention relative to the Treatment of Prisoners of War provides for repatriation of prisoners of war following the cessation of active hostilities.³⁰² If it can successfully be maintained that the captured Americans are not prisoners of war, the Geneva Convention obligation for immediate repatriation on the cessation of hostilities is not applicable. This would seem to be consistent with the position of the North Vietnamese government that "... (I)t (the U.S.) should announce the total withdrawal from South Viet Nam of U.S. troops...by June 30, 1971...so that discussion may immediately begin on the question of releasing captured military men, including American pilots captured while bombing the Democratic Republic of Viet Nam."³⁰³ The North Vietnamese have never really altered that position. If it was intended to release Americans immediately upon withdrawal of the United States forces, there would appear to be little to discuss once these forces were

withdrawn. However, the phrasing used by North Viet Nam would seem to indicate some important discussion following that event. It could indicate that North Viet Nam has further plans to manipulate the prisoners held in North Viet Nam in order to compel compensation for damage done by the United States bombing that country.

It may be surmized that the North Vietnamese probably have at least four objectives in their consistent position that the POW Convention is not applicable in the Viet Nam conflict: (1) An example to the North Vietnamese people, (2) To exert internal political pressure on the United States to terminate support for South Viet Nam, (3) To not alienate its pro-North Vietnamese support in the United States by displaying to the United States the effect of its mistreatment of American prisoners-of-war, and (4) The use of the American prisoners of war as hostages to extort payment for bombing damage to North Vietnam.

3. Israel's disregard of the Civilian Convention in the Arab-Israeli Conflict.

Israel has consistently violated several provisions of the Civilian Convention relating to the deportation of civilians, the destruction of their homes, and the expropriation of their property. Israel continues to violate the Civilian Convention by settling Israeli nationals on the property confiscated.³⁰⁴ Its assertion that the Gaza Strip will never be separated from Israel,³⁰⁵ combined with the apparent permanent settlement of Israeli nationals in territory occupied in 1948 and 1967, make it clear that Israel's goal is to acquire by conquest as much territory as possible. To do this, in accordance with the Zionist philosophy of making an exclusive Jewish state, it is necessary to exclude all but Jews from the borders of territory as it is conquered. So far as the Palestinian refugees are concerned, Israel apparently

considers them as having been permanently removed from its boundaries and cast onto the neighboring states, and gives no consideration to their repatriation in their homeland.

"Repatriation would mean that hundreds of thousands of people would be introduced into a state whose existence they oppose, whose flag they despise and whose destruction they are resolved to seek. The refugees are all Arabs; and the countries in which they find themselves are Arab countries. Yet the advocates of repatriation contend that these Arab refugees be settled in a non-Arab country..."³⁰⁶

The Israelis consider the permanent displacement of Arabs from what was originally Palestine an accomplished fact. The objective of Israel then has been to rid Palestine of Arabs, and further the Zionist concept of an exclusively Jewish state.

4. State interest predominates over the POW and Civilian Conventions.

The foregoing three examples illustrate three cases in which national objectives are in conflict with the humanitarian principles expressed in the POW and Civilian Conventions. During World War II, Russia felt the need to discourage its soldiers from surrendering. North Viet Nam has concluded that the American prisoners of war it holds are a potent bargaining chip,³⁰⁷ perhaps enough to gain its military objectives against the United States and to demand substantial aid in rebuilding areas damaged by U.S. bombs. Israel set forth on a program of establishing a state populated solely by Jews, and therefore required extensive land on which to settle them as they immigrated to Israel. Since the land was owned primarily by Arabs, it was necessary to deport them and seize their property.

It is evident that when the predominant objectives of a state are in conflict with the human values expressed in the POW and Civilian Conventions, the national objectives are given priority.

C. Why do non-state entities not comply with the POW and Civilian Geneva Conventions.

In the kind of warfare which has prevailed during the past twenty years, terrorist tactics have been used by guerrillas against civilians with no effort to comply with the Civilian Convention. Some typical tactics and the purpose of those tactics are detailed in Stephen T. Hosmer's Exerpts from Viet Cong Repression and its Implications for the Future.³⁰⁸ As in the case of states which do not observe the provisions of the Conventions, the guerrilla or terrorist objectives are considered by the individuals involved to outweigh the humanitarian values explicitly set forth in the Conventions. There is however, a problem in attempting to bind guerrilla or terrorist bands to the provisions of the POW and Civilian Conventions. As non-state entities, they have not signed the Conventions, and indeed do not possess the international personality required to sign an international treaty. How then are they bound by its provisions?

It has been suggested that there are two theories by which non-state entities are bound by the substantive provisions of the POW and Civilian Conventions. They may be considered as being bound as a result of the accession of the legitimate government to the Conventions, that accession being binding of all the states subjects.³⁰⁹ Or they may be considered as being bound to follow the substantive provisions of the Conventions because they are declaratory of customary international law which is universal in its application.³¹⁰ Since reliance on the first grounds would seem to exempt from the obligation to comply with the substantive provisions of the Conventions, all of those individuals who are not nationals of any state, as well as those states and the nationals of those states which have not acceded to the Conventions, there would be created a group with no legal obligation to observe

even the most rudimentary humane provisions of the Conventions. Such a position is intolerable in the world community. The better approach is that expressed by the Nuremberg Court in the High Command Case;

"...(I)t would appear that the IMT...followed the same line of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding in so far as they were in substance an expression of international law as accepted by civilized nations of the world..."³¹¹

It may be concluded that guerrillas and terrorists are bound by the principles set forth in the POW and Civilian Conventions, and that when they take prisoners, whether military or civilian, or occupy territory, they are obliged to comply with the substantive provisions of the appropriate convention. That their strategy is contrary to this is well known. That their violations are committed for the same reasons as states violate the Conventions is thus evident, namely, that immediate or long range objectives are given precedence over humanitarian values.

D. Specific Weaknesses of the POW and Civilian Conventions.

The provisions of the POW and Civilian Conventions are ignored because of several factors which hinder or prevent their enforcement. The first and most glaring deficiency is that enforcement is by the powers which are directly involved in the conflict. Hence, each state determines whether it will apply the Conventions in a given situation.³¹² This permits a state to unilaterally declare, either that its actions do not violate the Conventions, or that the Conventions are not applicable, or both. Compounding this defect is the absence of an impartial investigating body to provide complete information on which a state can rely, even to take unilateral action. Thirdly, there are severe limitations on effective sanctions which may be used in most instances to enforce the Conventions. The Conventions do provide for a Protecting Power, but this can be avoided by the expedient of simply refusing

to accept any state or organization in this capacity, but even when put into effect, the Protecting Power concept is an administrative rather than enforcement function.

1. Enforcement by Belligerents

Neither the POW nor the Civilian Convention make any provisions for an impartial fact-gatherer and decision-maker to sort out the conflicting claims in a combat or near combat situation, and to determine whether the Conventions are applicable in a given case, and if so whether they are being violated. This deficiency in an international treaty designed to preserve human lives and property may be attributed to the long accepted concept of absolute sovereignty on the part of each state, and the lack of an international organization with the authority to make binding decisions and the power to enforce them.³¹³ Accordingly the Conventions were drafted with the decision-making function vested in each state to a conflict, thus preserving to each state its traditional complete sovereignty. One major reason for this situation is the reluctance, nay, refusal of states, to relinquish to any authority the power which could be employed to enforce international obligations.³¹⁴ When the problem of enforcement is thrust upon the individual state, it may have no choice but to either go to war if the situation has not already deteriorated to that condition, in which case other states may be dragged into the conflict,³¹⁵ or forget the matter after appropriate diplomatic protests, in which case it is difficult to characterize the rules violated by the other state as law.

Although Article 120 and 146 of the POW and Civilian Conventions provide for contracting states to enact appropriate legislation providing penal sanctions for "grave breaches" of the Conventions, this is of little help when the state involved, in what it considers its national interest, has adopted an

official policy which contravenes the Conventions. This places upon the victorious state the burden of trying before an appropriate tribunal the vanquished leaders of the state or group which has violated the Conventions.³¹⁶ The victorious state may be reluctant to exercise this authority because of possible adverse world reaction. Even though great pains were taken to assure fair trials for the Nazi leaders following World War II, there were still charges of injustice, if for no other reason than there is an almost instinctive reluctance to permit one belligerent to try the defeated leaders of another.³¹⁷

Another inherent difficulty in states attempting to enforce Conventions providing for humane treatment for prisoners-of-war and civilians, is the practical consideration that the states are already at war; they have resorted to force, and in the absence of some neutral power to intervene, they are, in addition to fighting a war, required to act as their own policemen.³¹⁸ Since they are already at war, they may have no reserve power, either legal or illegal, to exert additional pressure on the enemy, in which case they have no remedy for breaches by the other side.

An eminent writer has assailed the concept of each state being its own judge in matters of international law, pointing to the weakness of some states and thus the impracticality of their enforcing their international rights, and the awesome power of states which possess nuclear weapons.³¹⁹ On the other hand, it has been pointed out that there is no assurance that men associated together in international political communities can be expected to exercise a higher and more exacting morality than men acting as individuals.³²⁰ When concerned with the application of power, indeed the question whether men can act on a higher plane in the international community is highly doubtful.

In spite of the efforts to fully effectuate the lofty ideals of the United Nations, partisan political goals rather than impartial notions of justice prevail, and provide justification for the attitude of skeptics. It may be concluded that at least so far as control of military power is concerned, individual states will continue, at least for the foreseeable future, to unilaterally exercise full authority over their respective military forces, and will likely use them when considered necessary to further their own national interests, as decided by the particular state.

2. Lack of impartial investigative agency.

Closely allied to the difficulties implicit in the role of decision-maker and enforcement agent cast upon the individual state involved in hostilities, is the lack of an impartial investigative agency to ferret out the facts so the state can make an informed decision. For example, suppose both parties to a conflict deemed that a state of war did not exist. Since Article 2 of the Convention provides only for a disputed situation in which one but not both parties deny the existence of war, would the Conventions be applicable? In this regard it should be remembered that the Conventions are designed to protect individuals, rather than promote state interests.³²¹ An investigative agency, empowered to make a full investigation in the field could quickly ascertain whether there was in fact continuing active hostilities between the states, as opposed to minor isolated incidents.

3. Sanctions Currently available.

The traditional sanctions available to a belligerent against whom the rules of war have been violated, are "a. Publication of facts, with a view of influencing public opinion...b. Protests and demand for compensation... c. solicitation of the good offices, mediation, or intervention of neutral states ...d. Punishment of captured offenders as war criminals. e. Reprisals."³²²

Of the sanctions generally considered applicable between warring nations only one, Reprisals, is of a warlike character. Reprisals generally involve a loss of human life or the destruction of property. For this reason, resort to reprisals may not be normally taken until other means of effectuating compliance with the rules of war have been exhausted.³²³

The conflict in Viet Nam in which the North Vietnamese have refused to comply with the POW Convention, and the Arab-Israeli conflict in which Israel as a matter of policy consistently violates the Civilian Convention, illustrate the near outer limits of a more powerful state confronted by a weaker one which refuses to comply with the POW Convention, and of weaker states confronted by a more powerful state which refuses to apply the Civilian Convention.

a. Sanctions in the Arab-Israeli Conflict.

In the Arab-Israeli Conflict there has been publication of the facts, though unfortunately this publication has included dissimulation of two versions of the 'facts', neither of which is very reliable. There have been repeated demands by the Palestinian Refugees for repatriation and/or compensation, and the diplomatic assistance of neutral states has been sought by the refugees and Arab states through the United Nations. In turn, the United Nations has responded with repeated resolutions urging the Israelis to comply with the provisions of the Civilian Convention.³²⁴ These sanctions of a peaceful nature have been to no avail. Despite the vocal assistance being offered by the United Nations, that organization's sincerity is likely questioned by many Palestinian refugees, since it was the United Nations' decision to establish a Zionist state in the heart of Palestine, an Arab controlled society for eighteen hundred years, which instigated the events leading up to the present state of affairs. Nor could the Palestinian refugees and the Arab states fail to take note of the United Nations position

that Israel need return only those territories occupied since 5 June, 1967,³²⁵ thus seeming to endorse the Israeli occupation of essentially all of that territory which under the partition resolution was to become an Arab state. Regardless of how the Palestinian refugees and Arab States view the publicity their situation has received through the United Nations, and the diplomatic assistance they have received from that quarter, it would seem that the assistance they have received has been ineffective, and that future diplomatic moves will also prove ineffective.

Having fruitlessly exhausted essentially all of the diplomatic resources which might normally be expected to be of some assistance in inducing Israel to comply with the Civilian Convention, the Palestinian guerrillas and Arab states would under recognized international principles be permitted to resort to reprisals. It is at this point that the Palestinian guerrillas and Arab states are stymied. For they have already been soundly defeated on each of the three occasions they have engaged in full scale military conflict against Israel. It may be presumed that in each of these three engagements, they employed essentially all of the forces they have available. Further, even if they possess chemical or biological weapons, experience has shown that their use would likely bring retaliation in kind by the Israelis.

Over the years, Palestinian refugees through their guerrilla organizations, and with the apparent approval of the Arab states, have occasionally launched attacks against Israeli settlements in occupied territory. Such attacks, even if accepted as reprisals, have generally been isolated acts giving the appearance of terrorist activity, rather than the increasingly acute pressure designed to induce a belligerent to cease certain illegal conduct. These isolated attacks have been met with retaliation by Israel, and have ultimately been more injurious to the Arabs than to the Israelis. Even if it were to be

accepted (which it cannot be because the attacks are nor even remotely likely to accomplish their purpose) that the isolated attacks on Israeli settlements are legitimate reprisals for Israel's violations of the Civilian Convention, and that the retaliatory attacks by Israel are illegal counter-reprisals, the Arabs and Palestinian guerrillas are militarily no more capable of compelling Israel to desist from the counter-reprisals than they are of compelling Israel to comply with the Civilian Convention.

It is apparent from the foregoing illustration, that where a state with marked military superiority over another state or states, is in violation of the rules of war, the weaker states have no means of compelling the stronger state to desist from its illegal activity, and therefore the right to resort to reprisals is meaningless.

b. Sanctions in the Viet Nam Conflict.

The Viet Nam conflict presents the reverse of that encountered in the Arab-Israeli conflict. In Viet Nam, one of the two principal powers confronting North Viet Nam is often described as a world super-power. Yet in Viet Nam, it is the North Vietnamese who refuse to comply with the POW Convention and who along with the Viet Cong, regularly and as a matter of policy violate the Civilian Convention as well as the Hague rules of warfare. Because the United States' direct interest is most apparent in the refusal of the North Vietnamese to apply the POW Convention to American prisoners-of-war, only that situation will be discussed here.

The United States has been rebuffed by North Viet Nam in its attempt to enter into direct negotiations to arrange for administration of the provisions of the POW Convention.³²⁶ The International Red Cross has on numerous occasions offered its services to the North Vietnamese to assist with the administration of prisoners held by North Viet Nam. On the two occasions in

which the North Vietnamese have forwarded replies to the International Red Cross, they have refused the offer of that organization.³²⁷ The United States has contacted neutral countries and countries sympathetic to North Viet Nam, in efforts to obtain proper treatment for the American prisoners held by North Viet Nam. These efforts have been fruitless.³²⁸ North Viet Nam has failed to heed an appeal from the Secretary General of the United Nations to permit some international humanitarian organization to have access to the American captives in North Viet Nam.³²⁹ Further, North Viet Nam has publicly stated that the United States would not get even a list of prisoners held by that country so long as the war continued, and until the United States had withdrawn its troops.³³⁰

The United States would thus seem to have exhausted those non-warlike sanctions available to it in its efforts to obtain proper treatment for captured Americans. At the very least, North Viet Nam has made it clear that further diplomatic efforts would not be productive.

The United States then, is entitled to resort to reprisals. Reprisals are uniformly defined as "acts of retaliation in the form of conduct which would otherwise be unlawful...for the purpose of enforcing compliance with the recognized rules of civilized warfare."³³¹ The traditional definition of sanctions contemplates the use of non-warlike measures before resorting to reprisals, and reprisals by definition contemplate the use of means of warfare which would otherwise be illegal. These definitions were apparently formulated with the idea that when powers went to war, there would be maximum utilization of their respective manpower and material resources, within the rules of legitimate warfare, to attain victory. Within that concept, if one of the powers violated the rules of war, the other had no legitimate means to rectify the matter, other than diplomatic channels. If that failed, the only force

which could be brought to bear would of necessity be force that would otherwise violate the rules of warfare.

By contrast, had the United States in Viet Nam elected to exert an all out effort against the North Vietnamese, including the use of nuclear weapons, invasion and occupation of her territory, and mining her harbors and coastline along with widespread destruction of her material resources, it would likely have been a very short war. On the other hand it would appear that North Viet Nam has been making an all out effort in its struggle with the United States and would, therefore, be expected to have few legitimate forces in reserve. The United States still has a number of legitimate means of warfare which could be used against North Viet Nam, and could, discounting the risk of having to fight other super-powers, bring an end to the war without regard to the question of reprisals.

The question is then raised, is the United States required to use the means of legitimate warfare still at its disposal before resorting to what is in the traditional definition, reprisals, or illegitimate means of warfare? Or put another way, do these unused legitimate military resources become means of reprisal even though they do not meet the "illegitimate" test of the traditional reprisals, or are they an additional sanction which must be exhausted before resorting to illegitimate means of warfare. It is generally accepted that "Other means of securing compliance with the law of war should normally be exhausted before resort to reprisals."³³²

If it is postulated that the reason other means of securing compliance with the rules of war should be exhausted before resorting to reprisals, is to minimize the destruction of human and material values, while at the same time compelling compliance with the rules of war by the other belligerent, then the traditional definition of reprisals would not seem to fit the fact

situation in Viet Nam. The traditional definition would require that the United States use nuclear weapons, mine the harbors and coastline of North Viet Nam, (which has recently been done) and perhaps invade that country if North Viet Nam refused to comply with the POW Convention, while at the same time denying less spectacular but perhaps effective means of compelling compliance because they are "illegal".

Logically, it would seem that values for which protection is sought by the restricted circumstances in which reprisals may be used, could best be preserved by a re-evaluation of the circumstances under which a nation is justified in resorting to means of illegitimate warfare. This reconsideration should look not to whether the means used is legal or illegal within the present definition, but instead to whether the means employed is reasonably calculated to attain the desired end with the minimum loss of human and material valued, as compared to another available means which might in and of itself meet the test as a legal means of warfare, but which if employed would result in considerably greater loss of human and material values. This approach would seem to require that when in a reprisal situation, and offered alternatives which would accomplish the objective, the means that would accomplish the objective with the minimum loss of human and material values should be selected regardless of whether the means employed is legal or illegal.

Because of its enormous military advantage over North Viet Nam, the United States has many military resources, both legal and illegal, which could be used against North Viet Nam. Among those resources are nuclear weapons, invasion of North Viet Nam, defoliation of North Viet Nam's crops,³³³ destruction of the systems of dams and dikes used in agriculture,³³⁴ and chemical and biological agents.³³⁵

Although at the present time there seems to be little real difference in the resolution of the dilemmas confronting the Arab states whose military position is decidedly inferior to that of Israel, and the United States which is militarily superior to North Viet Nam, the real difference between the two situations is that the Arab states have no military pressure to apply even in reprisal, while the United States, for whatever reason, has not yet chosen to unmask several effective means of reprisal available to it. This should illustrate that the sanctioning process in the enforcement of the POW and Civilian Conventions may be ineffective, both because a state or other power lacks the means to enforce the provisions, or having the means, chooses not to utilize them. The result however, is the same. The humanitarian rules embodied in the conventions continue to be disregarded.

c. Trials of War Criminals

Other than reprisals and diplomatic pressures, there is a third type of sanction which would seem to be properly placed in the category of a peaceful sanction, and yet which depends on force, or at least the threat of force for its effectiveness. This measure relies on the deterrent effect of criminal legislation prohibiting certain acts and providing for punishment where such acts occur. Such an approach would seem to have a place in the world order, for how can rules be justified which punish a private individual for both minor and major crimes, but do not punish those state officials guilty of crimes of monstrous proportions against civilian non-combatants or prisoners-of-war.³³⁶

The POW and Civilian Convention obligate each state signatory to enact legislation providing penal sanctions for persons responsible for "grave breaches" of those conventions.³³⁷ Under these Conventions, there are no provisions for international tribunals.³³⁸ In fact, detaining powers are

prohibited from trying prisoners-of-war by special ad hoc national courts, and as a practical matter by International Military Tribunals.³³⁹ Trials for violations of these Conventions then will normally be before national tribunals. Although, the Conventions provide for extradition of those accused of violations of the Conventions,³⁴⁰ it is not mandatory that states make such provisions for extradition. Therefore whether persons will be extradited to a state interested in trying a war criminal, depends solely on the detaining state.³⁴¹ It would seem that if all states complied with the penal sanctions suggested in the Conventions, there would be few violations of the Conventions, for those individuals inclined to violate them, would quickly be imprisoned pursuant to the Convention's penal sanctions, which include a duty to try offenders, or permit their extradition.³⁴²

It has been asserted that the threat of war crimes trials after the cessation of hostilities may be an effective deterrent.³⁴³ However, this assertion as well as the penal provisions of the POW and Civilian Conventions are ineffective deterrents simply because the individual who grasps for great power, is driven by an ambition which places his personal aspirations before anything else, even his own safety, and when this is combined with supposed patriotism and confidence of victory, the deterrent effect is nullified.³⁴⁴

It may be surmised that unless a state chooses to enforce the Conventions against its own nationals, at a municipal level, the Conventions will be ineffective during hostilities. Where the state's leaders see their own interests as requiring that the Conventions be violated, as has Israel in regard to the Civilian Convention, and North Viet Nam in regard to the POW Convention, these conventions in the absence of strong measures by the opposing belligerent, will be largely disregarded if such an approach would seem to benefit the belligerent.

E. Current Sanctioning Process is Ineffective

The measure of effectiveness of a sanctioning process should be reflected in the number of times, when put to the test, it has achieved the goals for which it was intended. On this scale the current sanctioning process ranks dismally low. The experiences of the Arab-Israeli conflict and the Viet Nam War have only fortified the principle that states will not yield to diplomatic moves to comply with humanitarian principles when the states objectives would seem to be best served by disregarding those principles.

Reprisals have proven ineffective in the Arab-Israeli conflict, largely because the Arabs and the Palestinian guerrillas lack the military power to effectively exert reprisal pressure. If the numerous terrorist type actions by the guerrillas were intended as reprisals, they have failed because of the lack of sufficient power and at the same time have disclosed a defect in the concept of reprisals. For an otherwise illegitimate act of war to become valid as a reprisal, there must be some reasonable expectation of its success, yet it must not grossly exceed the amount of force required to accomplish the objective.³⁴⁵ A Palestinian guerrilla assertion that their acts were reprisals then would fail, not because of a disproportionate excess of force, but because there was no reasonable expectation that the available force would succeed. The Israeli claims that the actions were acts of terrorism and that the Israeli actions were reprisals,³⁴⁶ would seem to be valid. Israel then would not be guilty of illegitimately using counter-reprisals,³⁴⁷ and the point is made, that reprisals are as a practical matter available only to states with the power to make them effective. The Viet Nam status of American prisoners-of-war, illustrates that even an extremely powerful nation may be deterred from resorting to effective reprisals, either because of internal political problems, or because it is so much stronger than the other belligerent

that reprisal action would be repugnant to the international community. Hence, reprisals may not always be available to those who have the power. Further, reprisals may lead to counter-reprisals, regardless of the respective merits of the two actions, and may result in a downward spiral of regard for humanitarian values.³⁴⁸ It would seem then that, where national interests are predominant, it may be concluded that neither peaceful nor warlike sanctions as presently exercised are likely to be effective.

Although war crimes trials are sometimes hailed as a potent deterrent force,³⁴⁹ in reality such trials are impractical during active hostilities, except where a state tries its own nationals, because the opposing side generally holds prisoners whom it is likely to try if trials are held by the other belligerent during hostilities.³⁵⁰ As a practical matter then, war crime trials of belligerents on the opposing side may occur only when that side has been totally defeated, and the risk of that is not so great as to deter illegal activity in the absence of enforcement by each side against its own nationals.

It may be concluded that the present world sanctioning process for the POW and Civilian Conventions is almost totally ineffective.

IV. Characteristics of a Desirable Sanctioning Process.

A. Comprehensive Sanctioning Process

Ideally, the most effective and satisfactory sanctioning process for the POW and Civilian Conventions is one which would serve to resolve all international problems as they arise, rather than attacking the problems on a piecemeal basis.³⁵¹ Such a process would require that organs be established which are responsible for collecting relevant and accurate data, evaluating that data, reaching conclusions and prescribing sanctions which would be effective and would be applied, appraising the results of the sanctions, and

determining when they should be terminated.³⁵² Unfortunately the states in the contemporary world have repeatedly demonstrated that they will not vest such all encompassing power in any entity. It is thus necessary for international lawyers to try to work within the existing framework, and reach workable solutions to everyday problems within the limits of hard practicality.³⁵³

B. A Sanctioning Process Attainable in the Forseeable Future

Although the world does not seem to be prepared to accept a central all-encompassing sanctioning process, perhaps in this century the world has become small enough so that a limited sanctioning process, based on humanitarian principles and still under the control of the states, would be an acceptable alternative. If such a process could be successfully implemented, then perhaps the principles learned in its execution could be applied in other fields. Still, there are tremendous difficulties involved in reaching an acceptable agreement between a sufficient number of states to implement even a limited international sanction process, where the two principle blocs of states appear to have near irreconcilable interests. Such a process might, however, be commenced within the framework of existing international organizations and treaties. It is perhaps within those existing institutions and agreements, that minimum requirements for a sanctioning process for the POW and Civilian Conventions could be provided to institute an impartial investigative agency, a respected and impartial decision-maker, and some reasonably effective sanctions.

1. Impartial Investigative Agency

Many of the crucial "facts" from the Viet Nam and Arab-Israeli conflicts are subject to question because there is no centralized, highly respected impartial fact finding agency, with free access to both sides of the conflict arena. Although the United Nations has been involved to a considerable degree

in this process, it has been unable to have the free access required for objective fact-finding. Indeed the United Nations team was compelled to withdraw from areas vital to the acquisition of required information immediately before the June 1967 Arab-Israeli war.³⁵⁴

The greatest hurdle in establishing an effective investigative agency, is finding investigators who will be respected and whose determinations will be accepted as creditable.³⁵⁵ Although the Civilian Convention provides for an investigation in the event that charges of violations are brought by a party to a conflict, there is a problem in actually putting this provision into practice because the investigators are not chosen until after the conflict arises.³⁵⁶ The entire process can therefore be thwarted by refusing to agree on investigators. In any revision of the present process, this defect must be eliminated, by determining beforehand who will be responsible for conducting investigations.

2. Decision Maker

Perhaps the greatest fault of the sanctions available to enforce the POW and Civilian Convention is that there is no authoritative power vested with the responsibility to determine whether the Conventions are applicable in an actual set of circumstances, and if so, whether they are being violated. There should be such an authority designated in the Convention, whose decision will be binding. Of prime importance in the selection of an acceptable decision-maker is that issues based on race or religion, or involving large or small nations, be decided on a non-denominational, non-discriminating and non-political basis.

3. Effective sanctions

The last requirement for a realistic sanctioning process is that there be available, sanctions which can be applied quickly, will accomplish their

purpose and can be rapidly removed when there is compliance with the Convention involved. It is suggested that to accomplish this, the active cooperation of all states will be required, rather than the somewhat ambiguous language of the present Article 1 of the POW and Civilian Conventions which merely states that; "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."³⁵⁷ The sanctions should be forceful enough so that they assure a transgressor that he has more to gain by compliance, than by non-compliance.³⁵⁸

V. Considerations Involved in the Establishment of a Sanctioning Process for the POW and Civilian Conventions.

"The more one goes into the topic of sanctions at present, however, the more is he puzzled concerning their value and usefulness. It is true that treaty observance is important but is it not also true, that in a world where nationalism is rampant, only those treaties which states consider to be to their advantage will be kept regardless of special sanctions, and that where treaties stand in the way of... 'politics of power', no amount of implementation on paper will deter a violator?"

Payson S. Wild, Jr., 1934³⁵⁹

In the nearly forty years since the above lines were written, there has been one major war involving nearly every state in the world, plus many smaller ones such as in Korea, the continuing Arab-Israeli conflict and the Viet Nam war. Awesome weapons have been invented and used, and deployed in preparation for further use, while the world's two most powerful nations maneuver for ultimate world supremacy. In the way of treaty enforcement, however, little has changed. The need for enforcement, exclusive of power politics is the same. One thing which has evolved, more perhaps in the last twenty years than at any other time, has been a growing awareness of individual human rights, at least in the non-communist states. It is this awareness, particularly among those nations just emerging from colonial rule, combined with the desire of the opposing major world powers to gain influence over those

nations, which might afford an opportunity to bring forth a fledging world sanctioning process, at least in regard to the POW and Civilian Conventions. The peculiarly humanitarian nature of these Conventions affords a vehicle embodying principles which any state would be hard pressed to publicly refute. The problem is to find sanctions which are as acceptable to the individual states as are the principles set forth in these Conventions. In formulating such a process, it is necessary first to determine which entities will be concerned in the process, what their interests are, the objectives of the sanctions, who will be the decision makers and investigators, the targets of the sanctions selected, what specific sanctions are to be employed, and how the sanctions will be executed.

A. Who will participate in the Sanctioning Process?

The ineffectiveness of the present Conventions to a great extent is due to the exclusive role placed on the belligerents to assure enforcement. Such a process amounts to little more than international anarchy. An inclusive system, by contrast, would function much as a municipal society, with all the states backing what would in effect become criminal legislation for the enforcement of human rights in any coercion process.

1. States Parties"

Since States are the basic entities which make up the world order, they will collectively be the primary participants in any sanctioning process. In the present world community, in which various nations enter into alliances with, or have common interests with states which oppose the interests of other groups or alliances of states, and in which there are conflicting views as to the role of man in society, and the nature of society itself, the mutual acceptance of common values in a sanctioning process is exceedingly difficult.³⁶⁰ The states may however, generally be grouped into three categories based on

their ideology. These alliances are commonly referred to as the free-world bloc - those states primarily based on the capitalist system; the Communist bloc - those states based on a Marxist ideology; and the third world bloc - or those states just emerging from colonial rule. Although there are differences among the various states in any particular bloc, and there are some exceptions as to how these states react in a given situation, the states in each bloc generally act with a common interest in international affairs.

2. International Organizations.

a. Worldwide Public and Private Organizations.

Principle among those existing worldwide organizations which could be utilized to participate in a sanctioning process for the POW and Civilian Conventions, are the United Nations and the International Committee of the Red Cross. In its comments submitted to the United Nations Secretary-General in June 1971 concerning Respect for Human Rights in Armed Conflicts, the Ukrainian Soviet Socialist Republic indicated that the United Nations should play an important role in the enforcement of the Geneva Conventions.³⁶¹ Since the Ukrainian Soviet Socialist Republic is actually a part of the Soviet Union, in the same sense as Kentucky is a part of the United States, it may be assumed that the Soviets used this method of putting forth the Communist view without at the same time committing the Soviet Union to a particular position. This would seem to offer some hope that the Communist bloc would accept a role for the United Nations in a sanctioning process. The United States, however may have some reservations about involving the United Nations in these functions.³⁶² Although many states are beginning to urge that there be some sort of international regulation of the Conventions³⁶³ still a number of states of which Belgium is typical, have expressed hesitancy at supplementing the role of the International Red Cross.³⁶⁴ In General, there seems to be a

consensus among states for some role for the United Nations, and for the continued and perhaps an increased role for the International Red Cross. The use of existing international organizations, rather than forming new specialized ones, seems to be the accepted consensus of at least the communist states.³⁶⁵

b. Regional Organizations

The question, "Should the role of regional organizations in supervision (of the Conventions) be examined?" was sent to those states participating in the 1972 Conferences on the Geneva Conventions. The replies indicated that slightly more states were in favor of a role for these organizations than were opposed to such a role.³⁶⁶ Those in favor generally recognized that the regional organizations had considerable power in the areas involved, while those which were opposed seemed to consider that such organizations were not sufficiently objective. Although it is difficult to deny the power of regional organizations such as the Organization of American States, SEATO, NATO, and the European Common Market, the effectiveness of a number of regional organizations attempting to apply sanctions which will likely require worldwide cooperation, in the absence of an authoritative coordinating body is highly questionable.

3. Guerrilla Organizations

A third group which will be involved as a participant in a sanctioning process are the various guerrilla organizations and "freedom fighters" scattered throughout the world. Although these organizations have no recognized international capacity, they do in fact exist, and they are responsible either directly or indirectly for a considerable amount of the conflict in the modern world. Whatever their legal capacity, they will be participants in any effective sanctioning process, if for no other reason than they will likely become the object of sanctions. If such is the case, the leaders of these

organizations will find it necessary to revise their tactics, and will of necessity be required from time to time to meet with other officials involved in the sanctioning process to determine what is required of them. Some states, particularly those against which the guerrillas are working, may not think very highly of this since they will feel such meetings imply some sort of international recognition of the guerrillas. Still, it has been suggested, and the rationale seems sound that:

"States by becoming Contracting Parties recognize in advance a limited legal personality in persons who may in future group themselves as rebels in armed conflict against the de jure government. The recognition conceded in this manner is sufficient to enable the rebel party to exercise the legal rights and be subject to the legal duties imposed by Article 3."³⁶⁷

B. Interests of Participants in the Sanctioning Process.

In order for an International sanctioning process to be effective, it must include most of the states, and some international organizations, to secure a broad power base for the implementation of sanctions, as well as for general acceptance of the process. Of vital importance however, is the absolute necessity for the support of the major world powers, such as the United States, Russia, Communist China, the United Kingdom, and France, and the support of highly industrialized states such as Japan. All states which manufacture significant quantities of war materials are of particular importance to a sanctioning process because the belligerent factions require such materials to engage in significant hostilities. It is these powers which must be participants in any sanctioning process, whose interests are of special concern. If their interests can be furthered by supporting the POW and Civilian Conventions, then the probability of implementing effective international sanctions will be greatly enhanced, for it is with them that the real muscle for sanctions reside. The interests of these and other states can be

catagorized according to predominate state interests, while the interests of International organizations which might be participants in a sanctioning process, depend on the purpose and goals of the entity as determined by its state members.

1. International Interests.

The two international organizations most likely to be directly involved in a sanctioning process are the United Nations and the International Red Cross. Despite its political character, the United Nations was founded to "... (M)aintain international cooperation in solving international problems of an economic, social, cultural, or humanitarian character..."³⁶⁸ The international Red Cross was formed and functions solely as a humanitarian organization.³⁶⁹ Most rules of warfare are humanitarian in character, but especially are those set forth in the POW and Geneva Conventions, the sole purpose of which are to safeguard human values.³⁷⁰ One of the prime interests of the United Nations and the International Red Cross is to see that the principles embodied in these Conventions are made effective. The International Conference of Human Rights held in Teheran in April and May, 1968, recognized the particular interests of the United Nations in this field, and specifically called upon the General Assembly to initiate a study to determine how these conventions among others of a humanitarian character, could be better enforced.³⁷¹ It would seem that at least the hope of many states is that the United Nations is to serve as a humanitarian organization where possible. The interests of the United Nations, are however, controlled by the interests of its members. In what future role the United Nations might be cast, or in what direction its interests might turn, depend on the individual and collective interests of its members.

2. National Interests

The national interests of a state may and frequently do come into conflict with humanitarian principles in the contemporary world. In the past, where a civil conflict was confined within the borders of a state, there was no question of international interests being involved. Now, however, as states find themselves allied with one of the three principle blocs in the world community, even otherwise internal conflicts take on international significance in their potential to shift the alliance of a state to one or the other of the three blocs. One cannot therefore consider the national interests of a state without recognizing the international implications of those interests. National interests in the contemporary world seem to generally revolve around two basic international values which are themselves interrelated. The first of these is the individual state efforts to acquire territory. Closely related to this is the interests of the major blocs of states in the type of government established over a given territory, for the internal matter of government, determines the bloc with which a state will ally itself, and hence affects the scope of the sphere of influence and potential collective power of the states in a given bloc.

a. Territorial Acquisition on the part of a "client" state.

Any analysis of the support being provided to the belligerents in Viet Nam, and the Arab-Israeli conflict, discloses that the United States, the leader in the free-world bloc, and Russia, the leader of the Communist bloc, are backing the side which they consider will benefit their national interests. The North Vietnamese objective is to conquer South Viet Nam and thus force it into the Communist mold. The Israeli objective is to carve out an empire in the middle east, and the United States of course has hopes of this empire being allied with the free-world bloc. In each conflict, there is the common

element of territorial acquisition by a small state, with expectations of a major backing power, that the acquired territory will be brought into its sphere of influence. The two interests, i.e. territorial acquisition and spheres of influence, cannot be separated, but are complimentary to one another. Further, it is the free-world bloc and the Communist bloc which are primarily involved in this struggle for territorial influence, with the emerging states being more the target of the conflict, than a participant. The conflicting interests of the leaders of the two major blocs provide armaments and advice thus leading to wars which are perhaps longer, and certainly more destructive of human values than if no power struggle between the major powers was involved. In the contemporary world however, one fact stands out. While the United States struggles to maintain the status quo, the Communist bloc, following a course of spawning revolution and guerrilla wars, seeks to acquire territory which can be permanently brought under Communist control. Their aims are concisely set out in the Manifesto of the Communist Party:

"The communists distain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win."³⁷²

That a communist government, once firmly entrenched will be fully supported by Russian armed forces regardless of the wishes of the people, was dramatically demonstrated in Hungary and in Czechoslovakia where the Russians directly intervened when Communist control was threatened. The justification advanced for this intervention was the claim that "resort to force 'in defense of the victories of socialism' is permissible under the law of co-existence."³⁷³ The concept of sovereignty of each state is thus, within the Soviet bloc being replaced with a concept of state Sovereignty secondary to the interests of the Communist bloc as a whole.³⁷⁴ In this manner, Russia actually acquires

territory, while ostensibly preserving the national identity of a state by not officially annexing it. This same type of philosophy is in operation in Africa among the emerging bloc, as recently independent states afford bases and other assistance to guerrillas operating against adjoining states.³⁷⁵

b. Spheres of Influence.

The desire of leaders of the major blocs to gain influence in various areas of the world is one which contributes immensely to localized conflicts. The United States aim for markets and sources of raw materials, without assuming political control of the individual states, and the Russian dogma of gaining political control secondary to trade factors, are in constant conflict, and are subject to exploitation by other states. Thus, Israel used a common religious background and an effective public relations program to isolate the United States from the Arab states and gain its support in the war against them, while Russia, perceiving an opportunity to enter the Mediterranean, backed the Arab States.³⁷⁶

c. Effects of participants interests on implementing sanctions for the Geneva Conventions.

The commercial and political interests represented by the various potential participants in a sanctioning process, may contravene, or at least significantly hinder the full recognition of the humanitarian interests implicit in the POW and Civilian Conventions. Particularly in states with the capitalist economic system, the possible cost of sanctions in terms of commercial activity may be especially relevant to the states position on the active enforcement of sanctions.³⁷⁷ Economic sanctions always pose the probability of at least temporary and perhaps permanent loss of lucrative markets and sources for raw materials. This effect would be most prevalent in the United States and states with similar economic interests.

The Communist bloc on the other hand, has devised a philosophy which would permit them to vocally act as a champion of human rights so far as guerrilla activity is concerned, and at the same time avoid any requirement to apply the conventions themselves, or being placed in a position to require that guerrillas which they support comply with the Conventions. The first step in this rationale, is the assertion that all activity in opposition to a non-communist power is of an international character.³⁷⁸ This brings the guerrillas within the POW or Civilian Convention.³⁷⁹ At the same time, action by any other group is labeled as "aggressive" or "unjust", as is the use of nuclear weapons.³⁸⁰ By maintaining that only wars of national liberation and defensive wars are "just" wars,³⁸¹ as is military action to compel continued membership in the Communist bloc,³⁸² the Communist can maintain that all other military action constitutes war crimes,³⁸³ and the rules governing prisoners of war cannot be extended to persons engaged in such activity.³⁸⁴ In short, any action which opposes an attempted armed conquest of a state by Communist forces, or communist controlled forces, is labeled as aggression and condemned as illegal. Hence persons opposing the communists are war criminals and the POW Convention is not applicable to them.³⁸⁵ Such an approach entirely ignores the humanitarian principles of the POW and Civilian Conventions.³⁸⁶ When combined with the Communist concept that persons who surrender are traitors, which was evidenced by the Russians in World War II,³⁸⁷ and the North Vietnamese in the Viet Nam War,³⁸⁸ plus the communist accepted role of terror tactics by "freedom fighters", the application of the Conventions is destroyed except as the so-called "aggressor" forces unilaterally elect to apply them. In spite of its inconsistencies, this line of reasoning may have particular appeal to emerging African states which generally consider international law as it developed as being directed against them by the former

colonial powers,³⁸⁹ and are therefore prone to maintain that much international law is opposed to their interests, is not universally accepted (by them), and therefore not law.³⁹⁰ So long as this rationale will seem to benefit those states, it is likely to be followed. However, the idealistic human rights provisions many of them have included in their Constitutions might be used to induce them to actively support a sanctioning process for humanitarian principles, provided they have a hand in setting up the process.

In any event, it is between states with conflicting interests and philosophies, that some system of workable sanctions for humanitarian principles in armed conflicts need be arranged. The key will be not so much in finding either a system to decide controversies concerning the Conventions, or even the means to enforce the Conventions if applicable, but rather to enlist the cooperation of those nations with interests as conflicting as those of the participants in the Viet Nam and Arab-Israeli conflicts.

C. What are the Objectives of a Sanctioning Process for the POW and Civilian Conventions.

The objectives of sanctions for the POW and Civilian Conventions is to preserve human life and consequential property, and to minimize human suffering through vigorous application of the principles contained in the Conventions. These objectives are therefore quite limited in that they do not seek to materially interfere with the traditional concept of military necessity, but rather only to eliminate or minimize unnecessary destruction of human and material values. Although a more lofty objective could be the elimination of the need for regulating injury to non-combatants by eliminating armed conflict, or at least minimizing its frequency and scope,³⁹¹ that objective is not feasible within the foreseeable future. The next best objective is that of minimizing the human loss caused by such conflicts. A major objective of a

sanctioning process then, is to convince the various states that their interests will be enhanced more by complying with, than with disregarding the humanitarian principles of the POW and Civilian Conventions.

D. Who are to be the Decision-Makers

1. Parties to the Conflict.

Experience has shown that states and other entities involved either directly or indirectly in an armed conflict, are not competent to make an objective determination concerning the application of humanitarian principles. The desire to acquire territory has clearly led to Israel's violation of the Civilian Convention, as had the same desire by North Viet Nam led at least in part to violations of the POW Convention. The individual state interest which consistently override humanitarian values, thus disqualifies individual states as the arbitrator of their own disputes as they concern humanitarian interests.

There has been an increasing realization by the community of states that international cooperation is necessary in many fields. Commercial arrangements more frequently involve international cooperation among states with common economic interests.³⁹² The growth of international organizations in areas other than commercial activity, has begun to reflect the shift from the individual sovereignty concept.³⁹³ There has even been one notable concerted effort by most states to impose non-military sanctions against a state alleged to be in violation of basic human rights within its own borders. The principle asserted as justification for this action was that such action by its very nature could not be confined within the borders of the state.³⁹⁴ Each of these situations reflects a growing tendency to rely more on multi-state action rather than each state acting as its own judge, and provides evidence of a possible willingness for the collective world community to accept, and the individual states to surrender, limited responsibility for making decisions in some areas.

Even when an international decision-maker is accepted by the states, it is unlikely that all authority to take action considered vital to its interests would be surrendered. Most likely, some reservation of legitimate authority to act in an emergency situation would still reside with the state. Such reserve of power could be patterned after Article 51 of the United Nations Charter, which permits a state to act in self defense in case of an armed attack, until the Security Council can act.³⁹⁵ Even where there is a sanctioning process which can effectively enforce the POW and Civilian Conventions, it may be expected that each state will continue to act as its own decision-maker within limited circumstances. However, the fact that their actions will be subject to review when a duly authorized authority investigates the matter and renders a decision on the merits, should inhibit illegal actions taken solely in self-interest.

2. International Committee of the Red Cross

The International Red Cross has long been the leading international body in administering the provisions of the POW and Civilian Conventions. This organization has observed that an objective determination of the existence of types of armed conflict would in itself lead to better definitions of these types of conflict. It has further noted the impracticality of creating a new body for this job. At the same time, the International Red Cross has stated that it did not desire to assume a role as a fact finder.³⁹⁶ It would seem that the reluctance of the International Red Cross to be involved as a fact-finder is consistent with its reputation as a humanitarian organization. To cast itself in the role of making findings for and against certain states or other entities, would subject the organization to charges of bias by states or organizations displeased with its decisions, and reduce the present level of respect for its impartiality as a humanitarian organization.

3. Regional or Ad Hoc State Organizations.

The alliance of most states with one of the three blocs of states, with competing political, ideological, and economic interests renders the idea of using regional state organizations, or ad hoc international state commissions as impractical as permitting individual states to act as their own decision-makers. The role of regional organizations has recently been considered in relation to their possible role in enforcing the Conventions, and while most states favored some role for these organizations, a large minority opposed any such role because of the lack of objectivity of regional organizations, again reflecting the belief that national interests would dictate a state's actions.³⁹⁷ At the same time, collective action by states acting as decision makers was considered and determined to be impractical³⁹⁸ for much the same reason. Such an arrangement would therefore not be acceptable to many states, and would actually leave the enforcement provisions much as they are in current Article 1 of the Conventions, and at least as ineffective.

4. United Nations Security Council and General Assembly.

The United Nations was founded partially with the idea that it would perform duties of a humanitarian character.³⁹⁹ Although matters "essentially within the domestic jurisdiction" of a state, were excluded from matters the United Nations was empowered to handle,⁴⁰⁰ sufficient power was theoretically awarded to the United Nations Organization, or specifically to the Security Council to assure that the will of the Security Council could be enforced in any situation on which the members might agree.⁴⁰¹ In fact, the United Nations through the Security Council was given all the tools required of a sanctioning process, including the investigatory power to ferret out facts on which it could act.⁴⁰² Although provided with all the machinery needed to operate as a peacekeeping organization, the Security Council finds that it cannot effectively act on any matter of real consequence.

The five permanent members of the Security Council are the leaders in the three blocs of nations whose national interests are invariably at stake in any armed conflict,⁴⁰³ and any one of these five states can veto any matter of substance before the Council and thus paralyze the United Nations in its peacekeeping function.⁴⁰⁴ It has been convincingly argued that a requirement of unanimity among the great powers must be met before any action of consequence be taken.⁴⁰⁵ Although this argument has to a limited extent been successfully rebutted,⁴⁰⁶ it is only the most unusual situation where the veto will not be effective, and it is unlikely that a major power would either abstain or be absent when an important issue is before the council.

Despite the inability of the United Nations as currently constituted to afford an effective sanctioning process even for humanitarian purposes, nearly half of the states queried before the 1972 Conference on the Geneva Conventions indicated they would oppose the establishment of a permanent supervisory body within the United Nations, because the United Nations might have to become directly involved in the Conflict.⁴⁰⁷ The political character of the United Nations security council and General Assembly would thus seem to conflict with an impartial vote. Certainly the Great Powers would never consent to having the Security Council made subordinate to the General Assembly as has been suggested by some writers,⁴⁰⁸ if for no other reason than that the General Assembly, where each state regardless of how large or small, has but one vote, is not representative of the peoples of the world either on a basis of power or of population.⁴⁰⁹

A predominant role for the United Nations General Assembly or Security Council in a sanctioning process for the POW and Civilian Conventions therefore would not be likely, or even desirable, because of the conflicting interests of the major powers.

5. International Court of Justice

Although neither the United Nations Security Council nor the General Assembly would be acceptable as a decision-maker because of their political makeup, there is one organ of the United Nations equipped to make juridical determinations on such matters as treaty interpretation and treaty violations. The International Court of Justice as the judicial organ of the United Nations,⁴¹⁰ is staffed with Judges whose background is primarily in the judicial rather than political field. The International Court of Justice is an existing organization with experience in international judicial affairs. All members of the United Nations are parties to the Statute of the court,⁴¹¹ and although many states have acceded to the jurisdiction of the court with reservations, nearly every state's accession is broad enough to cover the interpretation and determination of the application of treaties such as the POW and Civilian Conventions. Further the Court has the authority to request information from public international organizations⁴¹² which would include any United Nations agency or other international body, including a committee specified in an international treaty.

There are however several problems in selecting the International Court of Justice as a decision-maker. One of the more obvious difficulties is that not all parties directly involved in a conflict are states. Most of the present combat involves guerrilla bands even where they are not the primary combatants. The statute for the International Court of Justice limits its jurisdiction to states, with no provision for other entities.⁴¹³ On the other hand the jurisdiction does provide for cases which are referred to it by parties to the statute, or which are referred to it pursuant to "treaties and conventions in force."⁴¹⁴ Since most of the guerrilla organizations either have the

backing of a state or states, or operate from bases in a nearby state with or without permission of that state, it would seem that there are enough states with very real interests for at least one state to bring the matter before the Court either as a representative of the guerrillas, or as a defendant accused of providing arms, or training, or of harboring the guerrillas. Certainly, the Arab-Israeli conflict could get before the Court, although an indirect route would be needed to get the Viet Nam conflict before that tribunal since neither North or South Viet Nam are members of the United Nations. Perhaps the United States and either Russia or Communist China would be the parties actually before the Court in that case. In any event, the cooperation of all the major powers will be required if the Conventions are to work at all. If those states can be persuaded to accede to treaty provisions for real sanctions for the POW and Civilian Conventions, it would seem likely that pursuant to Article 35 of the statute of the Court, they would also support limited provisions to afford all signatories of the Conventions access to the International Court of Justice, exclusive of specific provisions in the Conventions, for matters pertaining to the Conventions, whether the states were also members of the United Nations or not.⁴¹⁵

Despite the reluctance of the Communist states to broaden the powers of the Court on the basis that the United States desires to use the court as a means of perpetrating its control over world affairs as a result of losing control of the General Assembly,⁴¹⁶ most states strongly support a role for the United Nations in the enforcement of the Conventions.⁴¹⁷ It is submitted that in view of the limited objectives of the treaties, and the expressed desire of most nations to have those standards enforced, it would be difficult for any major state to maintain its position of concern for humanitarian principles and still refuse to submit the interpretation of the treaty to the

court. Such a position would likely be more injurious to that state's interest among the newly independent states than would any decision of the court in the matter in contention. The increasing worldwide interest in human rights, especially among newly independent states is a factor which cannot be ignored by the major powers, and it is from that quarter that pressure favorable to the adoption of measures which could enforce the POW and Civilian Convention, could come.

E. Targets of Sanctions

Before it is possible to determine the kind of sanctions which should be applied in a particular instance, it is necessary to determine which individuals or groups of individuals are to be the targets of the sanctions selected. In this respect there are generally four choices. The enemies armed forces, his national leaders, or the general population, or any combination of these three. The enemies armed forces are the most likely targets of armed reprisals, its population a likely target for either legal or illegal destructive force or severe economic sanctions, while its leaders may be the targets of the sanctions directed against either the armed forces or the population in the sense that such pressures on the armies and population may be transmitted to the leaders in the form of threats to the leaders' power. The leaders are also subject to trial as war criminals if their forces are totally defeated and they fall into the hands of opposing forces. It has been previously noted in this article however, that the threat or possibility of trial as a war criminal, likely has little deterrent effect on the type individual who strives for great power.

It has been urged that sanctions should be directed only against a state's leaders, because it is those persons who are responsible for the international derelictions. This approach demands that the acts of the

leaders be considered as violating not only International Law, but also the state Constitution, so that the act is therefore illegal under municipal law. The people therefore should not be held liable for an act which is contrary to their constitution.⁴¹⁸ From this rationale it would follow that a sanctioning process should be directed against individual leaders rather than the state as such.⁴¹⁹

Almost directly opposed to the idea of accountability of only the leaders for derelictions, is Hans Kelsen's observation that in practice, sanctions are necessarily directed against individuals other than those directly responsible for the international delicts. This is justified in his view because sanctions permitted in international law "constitute collective liability of the members of the state for the international delicts committed by the government".⁴²⁰ On the other hand it has been suggested that in reality, sanctions (other than violence) directed against the state as a whole does not really affect the general population to any degree, except for those involved in international affairs or investments, for the rank and file of the citizenry continue with their lives as they were before the sanctions were applied.⁴²¹

It would seem that although the targets of sanctions are the leaders of a state which is violating a treaty or other international obligation in a given set of circumstances,⁴²² it is as a practical matter impossible to directly reach the leaders. Sanctions then should be directed against either the population or armed forces in such a manner that when applied, they will threaten the power base of the leaders, whether that base is military power or the support of the people. It is the armed forces and the population who have been and will doubtless continue to be the immediate targets of sanctions, with the ultimate goal being to affect the conduct of leaders through an

erosion of confidence or internal pressure. Such sanctions must therefore be accompanied by some form of communication to the immediate targets as to why the sanctions are being applied and what action is required before they will cease.

F. What Sanctions are to be used?

In evaluating sanctions which may be used to enforce the POW and Civilian Conventions, it is first necessary to consider what the side violating the Conventions has to gain by the violation. Since effective sanctions for the laws of war are "...the common conviction of the participants in the war or hostilities that self-interest is advanced by adhering to the law rather than by violating it,"⁴²³ it is necessary to determine what specific sanctions, when applied will result in the loss of the objective which the belligerent hoped to gain by violating the rules involved. It has been noted elsewhere in this article that war crimes trials are not an effective deterrent and except for an anti-climatic event following a total victory, are not likely to be applied on an international scale. In any event, it would be necessary to secure the support of nearly all states to activate an international criminal tribunal, and even then there is a substantial problem in getting the individual involved in hand to try him, without having to institute a full scale war against his state. The process would probably be more destructive of human values than the violations committed by the individual in the first instance. It was perhaps with such considerations in mind, that a majority of the states participating in the 1972 Conference on the Geneva Conventions opposed an international tribunal to enforce penal sanctions for violations of the conventions.⁴²⁴

1. General Considerations in the Selection of Sanctions.

Merely because a sanctioning process might be undertaken by essentially the entire world community does not mean that the sanctions to be applied are to be entirely without regulation as to severity or duration. Only the minimum force or other sanction required to accomplish the task should be used. Since it would be preferable to require compliance with the Conventions without using force, the sanctioning body should first call the breach to the attention of the responsible state before any sanctions are instigated.⁴²⁵ Only when the erring belligerent fails to take corrective action should the sanctioning process be set in motion. Sanctions ordinarily follow a two step process. First there is resort to non-forceful sanctions, that is diplomatic measures and world opinion, and if that fails force is brought to bear.⁴²⁶ It has been urged that world opinion is an extremely potent sanction and that its importance is growing in the modern world.⁴²⁷ Yet, world opinion has not forced Israel to return the Arab lands, nor has world opinion compelled North Viet Nam to comply with the POW Convention. It is submitted that world opinion is effective only when it will benefit the belligerent state's interests to heed the call of world opinion rather than continue on its course of conduct. When as in the case in the Arab-Israeli and Viet Nam conflicts, world opinion and diplomatic moves are ignored, then more forceful means may be used. These would include war and reprisals, but reprisals need not necessarily be military. They may be economic, and if vigorously applied, still be effective.⁴²⁸ Since an International Criminal Court has been dismissed as being impractical, as well as unacceptable to most states,⁴²⁹ only military and economic sanctions will be considered below.

2. Military Sanctions

In a situation in which a group of states are intervening with military force to require compliance with humanitarian principles in the conduct of war, their intervention would broaden the destruction of human values, perhaps beyond those values already involved. The imposition of military reprisals must be stringently controlled, or the resulting loss in human values may be irremediable,⁴³⁰ both in respect to the state against which sanctions are taken, and in respect to the sanctioning system which permitted its forces to get out of control. In applying military reprisals against a state, a world organization would be bound by the same rules as are individual states at the present time, that is, force must not be in excess of that required to accomplish the objective,⁴³¹ must not be used against forbidden targets,⁴³² and must be capable of being halted as soon as the belligerent complies with the rules violated.⁴³³ In order to meet these criteria, it would be necessary for a single military commander to maintain firm control over all sanctioning military forces involved. In a world which has for over twenty-five years been attempting to comply with Articles 42 and 43 of the United Nations Charter providing for a peacekeeping military force,⁴³⁴ it is unlikely that military forces could be marshalled to take action against a state effectively sponsored by a major world power. Military sanctions have not worked when applied by individual states, and the political realities would indicate that their use by the world community against a belligerent is highly unlikely.

3. Economic Sanctions.

When considered from the viewpoint of the conservation of human values, economic sanctions would seem to be preferable to armed force. It is however evident that economic sanctions alone will not be effective in all circumstances, if for no other reason than that the United Nations has tried

economic sanctions to enforce humanitarian interests in the case of Southern Rhodesia, and they were not effective.⁴³⁵ This would appear to indicate that sanctions denying military material to a state and generally imposing stringent economic barriers against that state are not an effective means of enforcing human rights. In a very general sense this may be correct. However Rhodesia at the time was not actively engaged in a war requiring massive amounts of war materials to continue on an even footing with its enemy. The POW and Civilian Conventions on the other hand, are applicable only during hostilities. In the cases of Israel and North Viet Nam, each state requires sophisticated arms which it does not have the resources to produce in order to compete with the opposing belligerent. If these materials are completely halted for a period of time, and the state continues to expend materials in combat, it will soon be unable to fight on the same basis as the opponent which has continued to receive its supplies. The difference between Rhodesia and the situations in which the POW and Civilian Conventions would be applicable, is that Rhodesia was not in a war with a power of comparable military potential.

As may be gathered from the preceding paragraph, the term "economic sanctions" as used in this article encompasses all trade, of every kind, and as used herein means the effective isolation of the erring state. In the contemporary world, each state or at least each bloc of states has grown increasingly dependent upon other states for materials to operate its industries, develop its human resources, and maintain its security forces.⁴³⁶ Though such dependence may eventually result in considerable world wide integration of resources and political power,⁴³⁷ its more immediate promise is as a sanctioning process in limited cases. The use of such sanctions as a cure-all is not suggested here, and it is recognized that their use in the

contemporary world is quite limited as demonstrated in Rhodesia. Such sanctions could heighten national pride in the state against which they are taken, stimulating the will to resist,⁴³⁸ and thus be counterproductive for some period of time. However, where the intended goal of the erring state may be lost if such sanctions are applied, it would seem that in cases in which the violation itself is not imperative to the national interests, then the risk of loosing the war may well outweigh the gain of continuing to violate the provisions of the Conventions. If for instance North Viet Nam was threatened with the loss of Russian and Communist China's support in the event it continued to violate the POW Convention, it would doubtless be compelled to comply. To do otherwise would be an immediate forfeiture of its goals. If Israel were confronted with a loss of all military aid, it would at least up until the past two or three years, have been compelled to comply with the Civilian Convention or face military defeat by its Arab enemies.

Although the proposition has been put forth that non-force sanctions are not of appreciable value in the world community,⁴³⁹ it is here submitted that where powers of comparable military manpower are actively engaged in hostilities, the pressure for modern weapons and supplies from outside its boundaries, create tremendous pressures on each warring faction. Termination of war supplies, especially where one party is numerically inferior, as is Israel compared to the Arab states, is especially critical.

G. What Strategies are to be employed in Executing Sanctions.

Having concluded that public opinipn and diplomatic pressures will not compel a nation to desist from violations of human rights in armed conflicts when the offending state considers that its interests dictate continued violations of the applicable standards, and having determined that military force is an unaccptable means for the collective world community to enforce

the POW and Civilian Conventions, it must next be determined how the remaining sanction, i.e. economic sanctions, is to be applied. The objective of the proposed sanctions would be total economic isolation of the offending state. Total economic isolation cannot be affected except with the cooperation of essentially all states. Where a powerful neutral state or group of states could seriously consider imposing military sanctions against a third state,⁴⁴⁰ only the cooperation of essentially all states can assure that economic isolation will be complete. Assuming that the United Nations provides teams of investigators for a sanctioning process, and that the International Court of Justice acts as a decision-maker, the United Nations will be involved in the process to such an extent that it might through the General Assembly, also serve as a coordinating agency to advise each state of the status of the sanctioning process. Further, the original investigating team could also provide surveillance to determine when the offending state has ceased its violations. Such surveillance would probably have to be from adjoining states and depend on intelligence sources until there was actual compliance, at which time the state against which the sanctions were directed would be expected to invite the team to investigate from within its borders, or within the borders of the occupied territory as appropriate.

VI. Enlistment of all Major Powers and Most Lesser Powers in the Sanctioning Process

Despite the obligation assumed by all Signatories of the POW and Civilian Conventions "...to respect and to ensure respect..." for the Conventions,⁴⁴¹ it will be exceedingly difficult to enlist the major powers in an international sanctioning process for those Conventions. At the present time Communist states will be most reluctant to put real teeth in any Conventions which might hinder the current activities of guerrillas. Additionally the Communist states

have proven in World War II, in Korea and in Viet Nam that they have no sincere regard for humanitarian values in regard to either their personnel, or that of their enemies, where their state interest is concerned. The United States, on the other hand, is reluctant to surrender any degree of sovereignty. Both the free-world bloc and the communist bloc therefore are reluctant to vest any real sanctioning power in an international convention, even one for humanitarian purposes. On the other hand, the emerging states voice strong support for "freedom movements" and may at the present have a genuine feeling for humanitarian principles, particularly as they might apply to guerrillas.⁴⁴² This feeling may be expected to continue so long as guerrillas are doing what the new states feel they should do, that is attempt to overthrow established governments other than that of the new states. When they begin to work against the new national governments, there may be some drastically revised thinking in that quarter. But at the moment the efforts of both the free-world and communist bloc to win the allegiance of those states could be capitalized on to gain their support for effective sanctions in the POW and Civilian Conventions.

A. Humanitarian interests should prevail over immediate state interests.

"The most fatal defect in world constitutive process is in the absence among many effective elites about the globe, despite the broad promises of the United Nations Charter, of a genuine commitment to the principle of minimum order...The deeds and practices too often belie the words of authority."⁴⁴³

The most effective system for enforcing human rights in armed conflicts, would of course, be the elimination of the armed conflicts. This is much like saying that the way to avoid the human suffering incident to violent crimes is to eliminate violent crime. While this is a most laudable ideal, it has no immediate practical application in either instance. The great hopes born at the formation of the United Nations organization, of forever eliminating

war, has long since died amid the roar of cannon and the crack of rifle fire as guerrilla and conventional wars have raged on nearly every part of the planet. Having failed to prevent war, the question now arises, can the various states really regulate the conduct of war so as to make its consequences less disastrous to those directly participating in the conflict. For humanitarian principles to be made effective, it will be necessary for the states to collectively decide that those principles stated in the POW and Civilian Conventions will prevail over any immediate state interests in conflict with those principles. Do any events tend to offer some hope that perhaps such an attitude might be fostered?

Actually when the world situation is surveyed, all is not as dark as might be portrayed in the Arab-Israeli and Viet Nam conflicts. Most of the states in Europe have already surrendered a greater measure of sovereignty in the interest of human rights than would be necessary to enforce the POW and Civilian Conventions. The European Convention on Human Rights and Fundamental Freedoms,⁴⁴⁴ represents a great step forward in placing human rights above purely state interests. Although the African states have not gone this far in their pursuit of human rights, many of the newly independent states have written provisions respecting human rights into their constitutions.⁴⁴⁵ A start toward a system similar to the European Convention on Human Rights has been made in the Americas,⁴⁴⁶ with the American Convention on Human Rights. With a growing tide of professed awareness of human rights, those considerations for human values expressed in the POW and Civilian Conventions might now receive greater emphasis to the extent that they could actually be enforced.

It is relevant to note that those states which have adopted the European Convention of Human Rights were those which most severely felt the ravages of War during the Second World War, and those which so quickly placed human rights

considerations in their constitutions were those which were long denied those rights. It is this last group of states in particular which look to international rules as a safeguard for equality and humane treatment.⁴⁴⁷ There is thus a great number of states on record as strongly supporting humanitarian concepts.

The real test as to whether the POW and Civilian Conventions can be provided with effective sanctions, is whether the most powerful states can be convinced that their interests will best be served by complying with the Conventions. The Communist bloc strongly urges that revolution is an international conflict⁴⁴⁸ and that revolutionaries or freedom fighters should be treated as prisoners of war. Russia is deeply involved in the Middle East with the Arab states and shares their interest in seeing the Civilian Conventions applied to the Israeli occupied territories. Each of these desires on the part of Communist states, combined with their desire to gain influence with other states, provide a negotiating tool for possible use in arriving at suitable and effective sanctions for the POW and Civilian Conventions. The United States having experienced the present communist attitude toward prisoners-of-war in Korea and Viet Nam with the resulting impact on the domestic scene, especially during the Viet Nam war, should be most anxious to avoid a repetition of that situation in any future conflict. Additionally the United States as well as Russia must feel the need to use every means of gaining influence with the newly emerging states and in refurbishing its humanitarian image.

Both the free-world bloc and the communist bloc thus have levers available to win concessions from the other side. Each side might therefore be able to get into the Conventions what they consider would best serve their national interests. A trade-off of effective sanctions for the POW and

Civilian Conventions, in exchange for treatment of guerrillas and terrorists as prisoners of war might induce the two major military powers to reach an agreement. It may be surmised from the numerous United Nations General Assembly Resolutions on such matters as respect for human rights in armed conflicts, and basic principles for the protection of civilian populations in armed conflicts,⁴⁴⁹ all of which refer either directly to the applicable Geneva Conventions or at least to the principles stated therein, that the great majority of states would favorably endorse an arrangement which would protect guerrillas that do not satisfy the current standards for legitimate belligerents, and provide effective sanctions for the conventions as rewritten.

Israel and North Viet Nam may be expected to vigorously oppose any such proposals. However, it must be recalled that the rules currently stated as they apply to those two states, are accepted customary international law, which those two states are currently, and have for some time been violating. They would naturally oppose sanctions being tacked to those rules. Complete unanimity is not however required for effective enforcement. In the Viet Nam war, the United States alone was able to require South Viet Nam to comply with the POW Convention, respecting guerrillas, despite their failure to meet all the requirements of legitimate belligerents. The support of all the major military and industrial powers should be at least as effective when applied against a state which must constantly strive to assure that its neighbors do not become militarily superior to it.

- B. The Sanctions to be applied and the system for administering them should be designated in the Conventions.

The greatest fault in international treaties concerning rules of warfare and human rights, is the absence of predetermined sanctions to be applied following a designated procedure, in the event of a breach of the treaty

provisions by a party bound by its provisions. Although the POW and Civilian Conventions provide for municipal penal sanctions to be applied against individuals for grave breaches of the Conventions,⁴⁵⁰ and the 1907 Hague Convention provides for Compensation for breaches of those rules,⁴⁵¹ neither provide for any system to compel the states to comply with those sanctions. It is this point which should be specified on the theory that if specified punishment will surely follow all violations, then there will be no violations. Under the present conventions, there is little chance that a state which violates the POW and Civilian Convention will be called to answer for its transgressions. States, therefore, can reckon their national interest solely on the basis of what they will stand to gain by violating the Conventions, rather than what they stand to lose by violating them, or even whether the gains will outweigh the losses, for under the present conventions as administered, there are no substantive losses to be considered. If specific sanctions would automatically be applied on the occasion of a violation, then at least the state contemplating a violation would have to weigh the possible gains against the known losses, and if it would lose more than it would gain, would likely be inclined to adhere to the provisions of the Convention concerned. It is not enough that it be known that specific sanctions will be applied when violations occur, but it must also be known that machinery is currently available to put those sanctions in force.

1. Investigative Procedure

The United Nations has undertaken a number of fact-finding missions in the past with varying degrees of success.⁴⁵² It has therefore shown that a properly constituted United Nations team can perform a valuable fact-finding service. A fact finding team operating under the auspices of the United Nations would therefore be preferable to one comprised of nationals from any

particular state. Since the International Court of Justice would seem to be the logical decision-maker regarding violations of the Conventions, that body pursuant to Article 50 of its statute should have a team of investigators appointed at all times to investigate charges of violations of the Conventions.⁴⁵³ The mere fact that there stands ready a body to take action in the event of breaches of the Conventions should of itself deter violations. The preparation and publication of a report should further reduce violations. Where a state accused of violation will not permit the investigative team to conduct onsite inspections, the report would necessarily be prepared from information otherwise available. An impartial gathering and sifting of the facts would seem to have a deterrent effect, for violations of the POW and Civilian Conventions can generally be ascertained by an impartial inspection. It is likely for this very reason that North Viet Nam has consistently refused inspection of the American prisoner-of-war facilities.

2. International Court of Justice

If after an investigation has been completed there are questions to be resolved concerning the juridical effect of the facts as ascertained by the investigative team, the case should be brought before the International Court of Justice. That organization is not political in character, and its members are required to act impartially in their judicial capacity.⁴⁵⁴ Upon the court's determination of the juridical significance of the facts before it, their findings should be transmitted to each state signatory of the POW and Civilian Convention. At the end of a predetermined period of time, a state found guilty of violations should be permitted to show that it is no longer in violation of the Conventions, subject to immediate inspection by the United Nations inspection team. If the inspection discloses that the state is then complying with the Conventions, a report would be submitted to the court and

the court would transmit copies to the same entities which received copies of its judgment. If the state was still in violation of the Conventions, the court would immediately transmit an addendum to their original judgment calling on each state to execute the sanctions provided in the Conventions. The sanctions would continue in effect until the violations had ceased. When the court is satisfied that the state is complying with the Conventions, the sanctions would be immediately lifted.

3. Sanctions

Once a situation arises, states are reluctant to instigate or approve sanctions against another state with similar interests. This tendency has been repeatedly proven in the United Nations.⁴⁵⁵ For sanctions to be applied, they must therefore be determined ahead of time and need only be executed. This puts each state in the position of being obligated to immediately take certain action upon the determination that a Convention is being violated. Such specific actions then should be set forth in the POW and Civilian Conventions.

4. Expectations of effectiveness of the foregoing proposals.

The principle that a state as a sovereign is sensitive to any action which might tend to disparage its national pride must be taken into account in any international sanctioning process. The foregoing proposals attempt to utilize that characteristic of sovereign states to bolster its effectiveness. A state has at least two opportunities to gracefully alter its practice to comply with the conventions, even after a complaint is filed with the court. Once the investigation has been completed and the state is made aware of the facts, it may then act to bring its conduct within the Conventions and assert that its former actions were based on the facts then known to it, and that in the light of additional facts disclosed by the investigation but unknown to

its state officials, there were technical violations of the Convention in question, which it has corrected. While permitting a graceful exit from a difficult situation by a state which was knowingly in violation of the Convention, this procedure also enables a state whose leader had in fact been kept in ignorance of the true facts to correct some problems within his own organization, and hence the "I didn't know I was wrong" rhetoric would in fact be true.

The second point at which a state may gracefully comply with the Conventions after a complaint has been filed is when the court has determined the juridical effect of the facts as determined. The state may then assert that even if it disagrees with the courts decision, it will still honor its obligations pursuant to the Convention and the decision of the court. The investigation and the court therefore offer two escape values by which a state may salvage its national pride and still change its course of conduct prior to sanctions actually being put into effect. This is an important feature, because the objective of the entire process is to secure compliance with the Conventions without having to resort to sanctions. This feature enhances that goal.

C. Proposed Articles to be included in the POW and Civilian Conventions.

The present POW and Civilian Conventions depend for their enforcement on the Articles in each convention providing for municipal penal sanctions against individual offenders,⁴⁵⁶ and the general undertaking that each state will respect and ensure respect for the Conventions.⁴⁵⁷ When as a matter of state policy the Conventions are violated, only the general principles of international law permitting various diplomatic efforts and reprisals remain to the state or states against which the violations are taking place. It is proposed that a sanctioning process be incorporated directly into the Conventions

so that there is no doubt as to what procedure can or will be followed in case of a breach of the Convention by any state or other entity. The breaches for which the sanctioning process would be activated should be only those violations defined as "grave breaches" as specified in Article 130 of the POW Convention,⁴⁵⁸ and Article 147 of the Civilian Convention,⁴⁵⁹ The acts specified in these articles are accepted as customary international law, and are therefore binding on every belligerent whether a signatory of the Convention or not, and whether a state or other organization.⁴⁶⁰ This approach is by no means unprecedented in international circles. The European Coal and Steel Community Treaty which came into force in July 1952,⁴⁶¹ between six European States provided for a High Authority whose decisions would be binding,⁴⁶² and which could impose fines and daily penalty payments against offenders within certain limits.⁴⁶³ The application of this principle to the rules of war however has not been successfully attempted, probably because when a state is engaged in war, it is fighting for survival, and there is little inclination to permit even disinterested parties to determine what a state may or may not do under those circumstances. The POW and Civilian Conventions are of very limited application and except in cases where a state sets out with the immediate goal of territorial acquisition as has Israel, the state interests involved are not great. In view of the purpose of the Conventions and the limited objectives ordinarily to be gained by violating them. the following proposed Articles for both Conventions would seem to have some reasonable possibility of being acceptable,

1. Revised Article 1

Recognizing that the substantive provisions of the Convention as set forth in (Article 130 of the POW and 147 of the Civilian Convention) embody long established customary law, the High Contracting Parties agree to comply with and to enforce those provisions against all belligerents, whether legal or illegal, and whether state or non-

state entities, according to the procedures and measures set out in this Convention. Recognizing that other provisions of the Convention while of an administrative nature, nevertheless are of a humanitarian character, the High Contracting Parties undertake to comply with and ensure compliance with those provisions in all circumstances.

The first sentence of this revised article would bind each state to participate in the sanctioning process against all entities which violated those provisions accepted as customary international law. Just what offenses are considered violations of international law is not left to the interpretation of the individual state, but is instead settled by reference to the grave breaches article of the respective conventions. The second sentence recognizes the administrative character of the greater part of the Conventions and that failure to comply with those provisions is not comparable to the destruction of human values that occurs when there are "grave breaches". This sentence further recognizes the distinction between those provisions of the Convention which are customary law and therefore binding on all contracting powers. Compliance with the administrative provisions is accordingly put on a much lower scale, relying primarily on the willingness of the states to honor their undertaking under the Convention, and the pressure of world opinion. The urgency for the enforcement of the administrative provisions is thus balanced against the destruction of values which could be involved if their enforcement were to be required subject to the sanctions. Further, an attempt to bring those detailed administrative provisions within the sanctioning process would clog the entire process with real and imagined violations of petty provisions, and thus decrease the time and resources available to enforce the substantive provisions.

2. Proposed New Article Vesting Jurisdiction to determine applicability of and Violations of Conventions.

The High Contracting Parties agree upon their adherence to the present Convention, to submit to the International Court of Justice all disputes concerning whether there exists a conflict to which the Convention is applicable, and if so whether there are existing violations of the Convention. If the court determines that such a conflict does exist, and that a High Contracting Party or any state receiving military or economic assistance directly or indirectly from a High Contracting Party, or any other entity receiving military or economic assistance directly or indirectly from a High Contracting Party, is in violation of the Convention, the Court will advise a representative of such state or other entity of its findings, and of their obligation to cease such violations, and will advise all High Contracting Parties and United Nations Members of its findings. If after sixty days from the time notification has been sent to the High Contracting Parties, the state or other entity involved, such violations have not been halted, the court will so notify all High Contracting Parties and all United Nations Members.

The article proposed would designate the International Court of Justice as the decision-maker for all parties to the Convention, whether they are directly involved in the conflict, or whether they are providing military or economic assistance to a party to the conflict. The jurisdiction under this article is aimed directly at the High Contracting Parties to the Convention, and by bringing in the contracting parties even where they are not directly involved in the conflict, may reach states which are not parties to the Convention but do receive support from the contracting party. This method can through a contracting party, also reach a guerrilla organization which could not itself be a party before the court because it is not a state (the court's jurisdiction is limited to states).⁴⁶⁴

Because of political factors in the United Nations, which at times serve to deny some states membership in that organization, the contracting states submission to the jurisdiction of the court is required in the Convention to permit the court to take jurisdiction of the dispute pursuant to Article 36 of the statute of the International Court of Justice.⁴⁶⁵ Since the jurisdiction of the Court is based on the principle of consent by the sovereign

states,⁴⁶⁶ that consent must be secured in some fashion and thus would seem to be the only route open prior to the time a dispute actually arises. After a dispute arises, an offender is unlikely to submit to the jurisdiction of the court. This technique has long been used in various types of conventions and is by no means unique. The 1970-71 International Court of Justice yearbook lists nearly two hundred treaties and conventions in which jurisdiction has been granted to the court, or to a previous international court to which the present court is a successor.⁴⁶⁷ Although this technique cannot be used to reach all conflicts, most notably those in which guerrilla bands receive no support from a contracting party and are thus engaged in genuine civil wars, and those in which a state receives no assistance from a contracting party, the experience in the present world over the past few years has shown that the great majority of conflicts of any consequence would come within a category to be covered by this proposed Article.

The actual dispute before the court would entail a bona fide case between two or more signatories of the Convention, regardless of whether the belligerents were signatories or not. This would be accomplished by providing in the sanctioning provisions, that once a High Contracting Party presented substantial evidence to another High Contracting Party, that an entity to which it was providing aid was violating the Convention, the second party would be obligated to immediately investigate the matter, and if such violations did exist, and were not immediately halted, it must stop all aid. If the second Contracting Party either determined that no violation existed, or refused to halt its aid to the entity guilty of a violation, then there would be a dispute between two High Contracting Parties. In this manner, the court could reach most conflicts in the present world order. The remainder of the proposed Article is self-explanatory and deals with the

mechanics of notifying states and other entities of the court's decision, and the status of that decision.

3. Proposed Article on Investigative Procedures.

The International Court of Justice will appoint four teams each consisting of seven members with five alternates upon these treaty provisions coming into effect. When a dispute arises between High Contracting Parties the court will attempt to designate a team whose members are acceptable to the High Contracting States which are party to the dispute, but if at the end of thirty days no agreement has been reached as to all or part of the membership of the investigative team, the Court shall designate a team without regard to whether members are acceptable to the High Contracting States involved in the dispute. The investigative team shall within sixty days of the date it formally meets with a majority of its appointed members, complete its investigation and submit a copy thereof to each High Contracting Party to the dispute and to the International Court of Justice. The Investigative team shall continue to be available to conduct such other investigations into the particular dispute as shall be directed by the court.

The purpose of the Investigative team shall be to gather facts for the court, and to notify the state parties to the dispute of the facts it has unearthed. The parties to the dispute should make every effort to mutually agree on the composition of the investigative team, but the procedure for designating the team should not be permitted to delay the investigation an inordinate amount of time. Hence, the court is authorized to fill all vacancies still existing after a reasonable amount of time. The investigators are not interested in the juridical effect of the facts they uncover, but only in the existence of the facts. For this reason and because the type of conduct defined as "grave breaches" can be readily ascertained with an onsite inspection, the investigative team is given a relatively short period in which to complete its investigation.

The Court will need the services of the investigative team to assure there has been compliance with the applicable Convention before the Court decides the case, provided the alleged offender maintains it has commenced compliance

since the original investigation. The Court will also need the team to assure there has been compliance after it renders its decision and before the sanctions go into effect, as well as to investigate claims of compliance after the sanctions are put into effect so they can be halted. The team would therefore remain intact until the sanctioning process is completed.

4. Proposed Article setting forth Specific Sanctions.

a. Upon notification by any High Contracting Party or by any state involved in an armed conflict, that any state or other entity engaged in the armed conflict is violating the (POW or Civilian as appropriate), the "grave breaches" article of the Convention, the High Contracting State so notified and which is providing military or economic support, or both, to the state or other entity alleged to be violating the Convention, shall within thirty days make a determination as to whether the allegations are true, and if they are true, shall immediately make every effort to have the offending party desist from such violations. If these efforts on the part of the High Contracting Party providing such support are unsuccessful, that High Contracting Party shall halt all military and economic support to the offending entity, shall halt all imports from and exports to the entity with the exception that medical supplies may continue to be provided, and shall withdraw all troops, and military advisors, from the entity in violation of the Convention.

b. If the High Contracting Party providing Military or economic aid, or both, to the entity accused of violating the grave breaches article of the Convention, either determines that the Convention is not being violated, or refuses to halt all military and economic aid and withdraw all troops, military advisors and diplomatic personnel, as provided in paragraph a above, the matter may be referred to the International Court of Justice by any High Contracting Party.

c. Upon a determination by the International Court of Justice that a state or other entity is in violation of the grave breaches article of the Convention and the failure of the state or other entity to halt such violations, all High Contracting Parties shall immediately halt all imports from and exports to the offending state or other entity, except for medical supplies, shall withdraw all military and economic aid and support, as well as all troops, and military advisors from the state or other entity determined by the court to be in violation of the Convention. These measures will continue in effect until the Court notifies the High Contracting Parties that the violations of the Convention have ceased.

d. In halting all exports to and imports from, and all military and economic aid to a state or other entity determined to be in violation of the Convention, all High Contracting Parties shall assure that their imports from non-contracting states and exports to non-contracting states are not originally from or ultimately destined for the state or other entity held to be in violation of the Convention.

e. When a contracting state refuses to apply the above sanctions after the appropriate determination by the Court, all other Contracting Parties shall immediately halt all exports to and imports from that state.

The sanctions proposed are designed to automatically go into effect once a violation has been determined. Paragraph a obligating a state which is supporting a belligerent to unilaterally execute sanctions against the belligerent in the event of a violation of the Convention, also serves as a means to get the supporting state before the court so a determination as to whether there is a violation can be made by that body. If the supporting state determines that there is no violation, then there is a dispute between the complaining Contracting state and the supporting Contracting state as to whether there is a violation. If the supporting state refuses to investigate the allegations, or to apply the sanctions where its investigation discloses violations, then it is in violation of the Convention. The paragraph e provides sanctions against a High Contracting State which refuses to comply with the Sanctions article of the Convention.

VII. Application of Recommended Sanctioning Process in Contemporary Situations.

Having recommended a sanctioning process for the POW and Civilian Conventions, it would be interesting to see how the process would apply to the Arab-Israeli conflict and to the American prisoners-of-war held by North Viet Nam. This should point out deficiencies in the system, and give some indication of factors which might inhibit its application in some circumstances.

A. American prisoners-of-war in North Viet Nam.

North Viet Nam procures nearly all its war materials from Russia and Communist China. Without the support of these two states, it would be incapable of fighting a conventional war at the level it has over the past

several years. As a consequence of the war, North Viet Nam holds in the neighborhood of 400 American prisoners-of-war. With few exceptions these prisoners are not accorded the administrative provisions of the POW Convention and there is substantial evidence that the substantive provisions are also being violated. The two most likely motives for North Viet Nam's refusal to comply with the POW Convention are the expectation that the emotional impact of the prisoners can be used to exert domestic pressure in the United States to withdraw support for South Viet Nam, and the hope of holding the prisoners as hostages until the United States pays North Viet Nam for the damages done to North Viet Nam by American bombs.

If the proposed sanctioning process was in effect when the United States became involved on a large scale in the Viet Nam War, the United States would have made a complaint to North Viet Nam, Russia, and Communist China, all of which have acceded to the POW Convention.⁴⁶⁸ Each of these states would have made a determination as to whether there were substantive violations, and if so, Russia and Communist China would have stopped all aid and assistance of any type to North Viet Nam, as would all other parties to the Convention. If Russia and Communist China maintained there were no "grave breaches", then the matter would have been referred to the International Court of Justice for investigation and a judgment on the merits. Assuming there was a determination that "grave breaches" of the Convention were occurring, the real question would be whether Russia and Communist China would carry out their treaty obligations. It is unlikely that at the commencement of the war, North Viet Nam, Russia, or Communist China would have realized the potential value of the American prisoners. From Russia's and Communist China's viewpoint, the option would be to comply with the Convention or have their trade with other Contracting Parties halted, and be confronted with adverse world opinion. Since none of

the three Communist states could afford to have the North Vietnamese armed forces severed from their source of supplies, it is likely that North Viet Nam would have been forced to comply with the Convention. It is even more likely that if the sanctions had been initially included in the Convention, the Convention would not have been violated in the first instance.

If these sanctions were to be proposed now however, with the Viet Nam situation in its present status, it is unlikely that either Russia, Communist China or North Viet Nam would accede to the new provisions of the Convention, unless a reservation was included to specifically exclude conflicts now in progress. Assuming however that they did accede to the Convention without that reservation, it is still likely that the pressure of world opinion combined with the loss of international trade, would require Russia and Communist China and therefore North Viet Nam to comply with the POW Convention.

B. Arab-Israeli Conflict.

Assuming that the proposed sanctioning process for the Civilian Convention were to go into effect in the near future, and that Israel, the United States and all the Arab states acceded to the new sanctions without reservation (it is acknowledged that this is extremely unlikely), what would be the expected outcome for Israel's violations of the Civilian Convention. The expulsion of civilians from occupied territory, and unlawful seizure of their property are listed as grave breaches.⁴⁶⁹ There is no doubt that these offenses have occurred following the 1948 and 1967 wars. The violations occurring within the time frame they did, raise questions concerning the nature of the offenses of expulsion of the inhabitants and the seizure of their property, and concerning whether the sanctions would operate retroactively to include past offenses, or only prospectively.

The violations listed under the grave breaches Article of the Civilian Convention are each violations of customary international law.⁴⁷⁰ The fact that these violations occurred immediately following Israel being proclaimed a state, and before the Civilian Convention was signed and ratified would therefore be immaterial, so far as whether the actions are grave breaches. Since the Civilian Convention was in effect long before the June 1967 war, there is no question as to its applicability to the territory occupied in that conflict. The proposed sanctioning process however would have come into being after the 1948 and 1967 wars. This poses a problem as to when the violations of the Civilian Conventions are complete. Is the expulsion of civilian inhabitants of an occupied territory completed at the time they are physically removed from the territory, or is the refusal to permit them to return also part of the offense, making the violation a continuing offense into the indefinite future? Is the seizure of private property completed once the owners are deprived of it and new owners, public or private, have assumed ownership, or is this a violation which continues so long as the original owner is denied his property? These questions are important because of the nature of the proposed sanctions. The sanctions are not punitive in nature. Instead they are designed solely to stop infractions which are then occurring, not to exact punishment for past performance. This is apparent in the provision for all sanctions to be lifted once the violations have stopped. In this respect they are like reprisals which must cease when the violations cease.⁴⁷¹ Therefore, if the violations are completed before the sanctions are applied, there is nothing to halt and the sanctions would not be put into effect. The purpose then of sanctions is to stop violations, not to exact punishment or right those wrongs which have already occurred. These are matters for another forum, and regardless of how desirable it might be to use

the available sanctions to see that justice was done for past wrongs, it is likely that the more limited objective of merely stopping current violations would be a more acceptable formula for prospective signatory states, and the chances for effectiveness against an erring state would be enhanced because the more limited objective exacts less toll from the erring state, and it therefore need not be compelled to resist the sanctions with such determination.

Yet, the violations committed in both the 1948 and 1967 conflicts could have been completed within a matter of a few months and before the sanctioning process could have gone through all the preliminary matters required before sanctions may be applied. If the sanctions of the Civilian Convention could not be applied on Israel's demonstration that further violations were not being committed because its objectives were gained, then the purpose of the Conventions would be frustrated. It would seem that the offenses of expelling occupants from their lands, and seizure of the land would be continuing offenses, for a reasonable time, but not indefinitely. While it may be difficult to articulate a precise definition as to when the violation was an accomplished fact and no longer subject to the proposed sanctions, it would seem that the 1948 violations have been completed, for the territory occupied during that conflict has long been assimilated into Israel. On the other hand, the territory occupied in 1967 has not been completely absorbed into Israel. Although settlements have been made in this territory,⁴⁷² the resettlement has not been completed. Additionally, the vast majority of states seem to have accepted that Israel's annexation of the territory occupied in 1948 is a fact,⁴⁷³ but strongly protest the occupation of the territory occupied in 1967.⁴⁷⁴ It would therefore seem that the violations in the territory occupied in 1948 have been completed and are without the sanctioning process. The

violations in the territory occupied in 1967 would seem to be continuing and would come within the sanctioning process.

The foregoing analysis also answers the question whether the sanctioning provisions would operate only prospectively. Since the 1948 violations are completed, they would not be applicable to those violations. Nor would they be applicable to the 1967 violations of unnecessarily destroying homes and other buildings,⁴⁷⁵ for those violations too are completed. They should, however, be applicable to other 1967 violations of a continuing nature, because the violations are currently in progress.

Assuming that the sanctions recommended in this paper were to go into effect tomorrow, how would they be applied against Israel? The procedure for notifying various states would be the same as that in the prisoner-of-war held by North Viet Nam situation. Since the United States is the primary source of arms for Israel, it, as well as other states, would be required to impose sanctions on Israel. In view of the limited objective, permitting inhabitants of the lands occupied in 1967 to return, and withdrawing the Israeli settlers, it is likely that despite internal pressure from Jewish groups in the United States, that the United States would comply with the Convention.

There is however, a question whether at this time, Israel would comply with the Convention. There is some evidence that Israel is building nuclear weapons.⁴⁷⁶ If this is the case, Israel, militarily, could hold its Arab neighbors at bay for a considerable period of time without outside help. But Israel could not long survive without world trade while remaining on a war alert against the Arab states and guerrilla forces. This sanction then, again because of the limited objectives, should be sufficient to force compliance as to territory occupied in 1967. Indeed, if Israel does now have

Atomic weapons, the need for this occupied territory as a defensive buffer zone would not seem to be so pressing. It is therefore suggested that the proposed sanctioning process could most likely be used to halt and even reverse the Israeli violations occurring in the territory that Israel occupied in 1967.

CONCLUSIONS

The POW and Civilian Conventions are intended to provide protection to prisoners-of-war and civilians in occupied territory. The enforcement of these Conventions has been left principally to the good intentions of the captor and the occupying power. When the captor or occupying power declines, for whatever reason, to comply with the applicable convention, the other state must currently rely on world opinion and reprisals to halt the illegal conduct. When the state or other organization against which the illegal action is being taken, has no military means with which to threaten the offending state, and the offending state's interests are more valuable to it than is world opinion, there is no effective remedy for violations.

Whether a state will comply with the POW or Civilian Convention, depends on whether its interests will be substantially advanced by the violation, as compared to any losses which may be incurred as a result of the violations. The key to a successful sanctioning process, is therefore a system which would assure that the interests of a state would be injured more by non-compliance, than they would be furthered by non-compliance.

The effectiveness of an international sanctioning process depends on reserve power which can be brought to bear when international standards are violated. This reserve power may be in the form of either military or non-military reserves, or both.

The warlike reserves may be constituted of either legal or illegal means of armed force, which either are not being used, or are not being used to the maximum extent of which the possessor is capable. Potential objects of attack, whether legal or illegal, or both, also add to the arsenal of reserve power available to a belligerent, provided the belligerent has the military capability of hitting those targets. Military sanctions therefore depend for their effectiveness on reserve forces of military power, and on the vulnerability of enemy targets which are not, or have not previously been attacked in full force, either because the target is not a legitimate object of attack, or through some tacit understanding.

Non-military sanctions include all available diplomatic channels, world opinion, and economic isolation. The effectiveness of diplomacy and world opinion vary with the sensitivity of the offending state to these factors. Where the offending states interests are greatly enhanced through the illegal conduct in question, as is Israel's seizure of Arab territory, diplomatic pressure and world opinion are likely to be ignored with the realization that both will fade away in time. Economic isolation must be complete to be effective, and even in the modern world in which many states are greatly dependant on others, is not likely to be effective when the state isolated is not engaged in a war which requires it to expend materials and supplies substantially in excess of its productive capacity. On the other hand, when a state is either actively engaged in warfare requiring the import of large quantities of war materials, or is compelled by hostile neighbors to maintain at least a posture of military equality, the threat of economic isolation is an effective deterrent. Economic sanctions would therefore be effective in those circumstances in which the target state is actively engaged in large

scale war (relative to the size of the state), or is surrounded by well armed hostile neighboring states.

The practical and political problems involved in mustering an international military force, have been aptly demonstrated by the futile efforts of the United Nations in this regard over the past twenty-five years. The humanitarian nature of the POW and Civilian Conventions is such that sanctions embodying armed force should be avoided in any event, where any other means are reasonably available to compel enforcement of the Conventions humanitarian provisions. Measures involving economic sanctions are likely, in an active combat situation to be at least as effective as massive military force, with less immediate destruction of human values. The potential of mustering sufficient support for economic, as contrasted to military sanctions is greater, and may well be acceptable to a sufficient number of states to be effective.

An entity with the respect and confidence of the world community would be required to determine when the sanctions are to be put into effect. The unique position of the International Court of Justice, its access to investigative resources, and the general attitude of states that the United Nations should be involved in this function, all favor its being designated as a decision maker for the proposed sanctioning provisions of the POW and Geneva Conventions.

The sanctioning process proposed in this article are not, however, without limitation. The most obvious limitation is that they will not work in a war between the major industrial world powers, for these states are capable of respectively manufacturing their own war materials. On the other hand they should work in any conflict between states other than those powers. The

proposed sanctions also require prompt implementation in the event of violations. Otherwise the objective of the offending belligerent will be gained before sanctions are applied. A case in point is the territory which Israel occupied in 1948, and which is now generally conceded as being part of Israel, rather than occupied territory. The sanctions must therefore be put into effect before the offending state has consolidated its gains.

In the last analysis however, the question on which any effective sanctions must hinge, is whether the collective world community really values the humanitarian principles expressed in the POW and Civilian Conventions, more than the potential national gains which may accrue through the violation of those principles. If the answer is in the affirmative, then effective sanctions can be made available. If the answer is in the negative, then no proposal to enforce those provisions will be accepted or enforced. The states will then continue to mouth pious platitudes as hob-nailed boots leave their imprint on the victims of war.

FOOTNOTES

1. U.S. Const. amend. I - X.
2. G.A. Res. 265, U.N. Doc. A/810 at 71-77 (1948).
3. Convention for the Protection of Human Rights and Fundamental Freedoms Between Belgium, Denmark, France, Federal Republic of Germany, etc., Jan. 4, 1950, 1950 Europ. T.S. No. 5, 213 U.N.T.S. 221.
4. 1 Peaslee, Constitutions of Nations, (rev. 3rd ed. 1966) refer to the Constitutions of, Burundi (1962) at 19, Central African Republic (1962) at 50, Chad (1962) at 65, Republic of the Congo (1963) at 85, Malawi (1964) at 476, and Republic of Senegal (1963) at 697.
5. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, (1910), 36 Stat. 2277, T.S. 539.
6. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.
 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85.
 Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.
 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.
7. Pictet, The Need to Restore the Laws and Customs Relating to Armed Conflicts, in 1 The Review of the International Commission of Jurists 23 (1969).
8. Geneva Convention Relative to The Treatment of Prisoners of War, opened for signature Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.
 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.
9. J. Kunz, The Changing Law of Nations 652 (1968).
10. Hague Convention No. IV, supra note 5, art. 3.
11. Kunz, supra note 9, at 622.
12. G. Draper, The Red Cross Conventions 24 (1958), "In the field of human rights, the Conventions have not only provided legal definitions of precision but have also required states to provide penal sanctions for their violation...They have extended the law of war for the protection of civilians and their property to a remarkable degree. In so doing they have given emphasis to the fact that the worst atrocities do not take place on battlefields..."

13. Id.
14. Friedmann, National Sovereignty, International Co-operation, and the Reality of International Law, 10 U.C.L.A. L. Rev. 739, 746 (1963).
15. Draper, supra note 12, at 95, "The Geneva Conventions are an attempt to restrict abuses and infringements of the humanitarian principles, and at the same time, to ensure that the like abuses do not occur in the imposing of penal sanctions against offenders. The latter attempt is no less important than the former."
16. Id.
17. Rubin, Legal Aspects of the My Lai Incident, 49 Ore. L. Rev. 260 (1969-70), "... (I)t is irrelevant that the conflict itself may be "legal" or "unjustifiable"; the rules to limit the hurt to the helpless apply to all parties to a conflict regardless of its origin."
18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.
19. Id., art. 13.
20. Mallison, The Zionist-Israel Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership in it: Appraisal in Public International Law, 32 Geo. Wash. L. Rev. 983, 987 (1964).
21. Id. at 989.
22. Id. at 992.
23. Id. at 993.
24. Bassiouni, The "Middle East": The Misunderstood Conflict, 19 Kan. L. Rev. 373, 374 (1970-71).
25. C. Douglas-Home, The Arabs and Israel, A Background Book 14, (1968), "The Jewish element had virtually disappeared with the sacking of Jerusalem in AD 70, when the dispersion began....The first Jewish settlements to return to Palestine were brought in about 1855, and from then until 1914 these agricultural colonies increased until the Jewish population of the area was nearly 100,000 - still a decided minority compared to the Arabs, but certainly a noticeable one."
26. Id.
27. Id. at 15.
28. Bassiouni, Some Legal Aspects of the Arab-Israeli Conflict, Vol. XIV number 10-11, The Arab World 41 (magazine is undated, printed in 1968-1969).

29. Mallison, The Balfour Declaration: An Appraisal in International Law, in The Transformation of Palestine Essays on the Origin and Development of the Arab-Israeli Conflict 61, 96 (ed. by I. Abu-Lughod 1971).
"In order to establish the three clauses of the declaration as binding international law, it was necessary to obtain multilateral assent from other national states. This was accomplished mainly through the mandate system provided for in the League of Nations Covenant."
30. Id. at 103, "It is widely accepted that both the League of Nations mandate for Palestine and the Anglo-American Convention on Palestine were terminated at the end of the British mandate. There is no record, however, of any protest by the states that were parties to the Palestine mandate and to the Anglo-American Convention concerning the Zionist-Israel claims which rely upon the continuing validity of the Balfour Declaration. In particular neither the United States nor Great Britain has protested. The declaration is thereby established as international law through customary law-making process of the implicit agreement of states expressed by toleration, acquiescence, and silence."
31. Id., "The result, however, of the establishment of the Balfour Declaration as customary international law is its acceptance as a whole. This undoubtedly creates a very difficult situation for the state of Israel and its juridicially linked Zionist Organization, because of the systematic and continuing character of the violation of both of the safeguard clauses."
32. Stein, The Balfour Declaration (1961) frontpiece.
33. Convention between the United States and Great Britain in Respect to Rights in Palestine, Dec. 3, 1924, (1925), art. 2, 44 Stat. pt. 3. pp. 2184.
34. Id., art. 15.
35. Id., art. 2.
36. Supra, note 29, pp. 64-85.
37. Supra, note 24, at 384; Supra, note 25, at 16.
38. Id., art. 4.
39. Id., art. 11.
40. Id., art. 7.
41. Id., preamble.
42. Supra note 28, at 41.
43. Supra note 33, arts. 2 and 15.

44. Supra note 25, at 17, "It was not until the European persecutions of the 1930s that Jewish immigration picked up, and with it the possibility of Palestine becoming not only a national home for the Jews, but rising to Jewish statehood in the process....Of course that possibility had always been the objective of the Zionists."
45. Supra note 28, at 42.
46. Id., at 41: Supra note 24, at 385.
47. Supra note 24, at 392, "Part of the blame for the present impasse must be squarely placed on the shoulders of the United Nations, which failed to enforce its own plan, thereby leaving the parties with no alternative to the collision course they have been on since 1967. And the war for Palestine is continued by Palestinians who disclaim anyone's right to dispose of them and their destiny."
48. The National Geographic, July 1972, vol. 142, no. 1, (Supp. Cultural Map of the Middle East) pp. 1A.
49. Id.
50. U.S. Dep't of State, Pub. No. 7752, State of Israel 1 (rev. 1971).
51. U.S. Dep't of State, Pub. No. 8152, United Arab Republic 1 (rev. 1971).
52. U.S. Dep't of State, Pub. No. 7956, Hashemite Kingdom of Jordan 1 (rev. 1970).
53. U.S. Dep't of State, Pub. No. 7816, Republic of Lebanon 1 (rev. 1970).
54. U.S. Dep't of State, Pub. No. 7761, Syrian Arab Republic 1 (rev. 1971).
55. Supra. notes 51 - 54.
56. Supra note 51, "The imbalance between resources and a growing population is the most serious obstacle facing the nation in its drive to raise the standard of living of its people."
57. A. Eden, The Refugee Problem, in The Israel-Arab Reader 152 (ed. W. Laqueur 1968).

Supra, note 50, at 3, "On May 14, 1948, the state of Israel was proclaimed. The following day armies of neighboring Arab nations entered Palestine and engaged in open warfare."

Supra, note 25, at 22, "On the day Britain left Palestine - May 14, 1948- Ben Gurion declared the establishment of the State of Israel....The Arab armies marched on Israel the moment the establishment of the state was declared."

58. Friedmann, The Reality of International Law - A Reappraisal, 10 Colum. J. Transnat'l L. 46, 47 (1971), "...Israel...has since its birth in 1948 constantly fought for its survival among hostile neighbors and ...has since 1967 openly asserted the paramountcy of what it considers to be conditions of survival over rules of international law, including resolutions passed by the United Nations."
59. Supra, note 57 at 151.
60. F. Gewasi, The Case for Israel 121 (1967).
61. Human Rights Comm., U.N. Doc. E/CN. 4/2. 1195 (1972).
62. G. A. Res. 2792 A-E, 26 U.N. GAOR Supp. 29, at 46, U.N. Doc. A/8429 (1971).
63. G.A. Res. 2851, 26 U.N. GAOR Supp. 29, at 48, U.N. Doc. A/8429 (1971).
64. Hourani, Palestine and Israel, in The Israel-Arab Reader 273 (ed. W. Laqueur 1968).
65. Supra, note 57, at 152.
66. Childers, The Other Exodus, in The Israel-Arab Reader 147-148 (ed. W. Laqueur 1968).
67. Id., at 149.
68. Supra, note 28, at 45, "During the first phase of the Arab-Israeli War (1947-49), over 800,000 Palestinian Arabs fled or were expelled from their homes by Zionist military forces. They found refuge in Jordan, Egypt, Syria, and Lebanon, where the United Nations UNRWA undertook to assist them. Today there are 1,344,576 registered refugees."
69. Hammad, The Culprit, The Targets, and the Victims, in The Arab World. Oct-Nov. 1969.
70. E. Buehrig, The UN and the Palestinian Refugees 15 (1971).
71. Supra, note 57 at 155-156, "In every case but that of the Arab refugees now in Arab lands the countries in which ...refugees sought shelter have facilitated their integration. In this case alone has integration been obstructed."
72. Int'l Rev. Red Cross No. 126, 506 (Sept. 1971).
73. Hourani, Palestine and Israel, in The Israel-Arab Reader 275 (ed. W. Laqueur 1968).
74. Supra, note 18, art. 49.
75. Id.
76. Terror and Urban Guerrillas, A Study of Tactics and Documents 45 (ed. J. Mallin 1971).

77. Id., "Recognizing that unconcentional warfare was their best strategy, the Palestinians began utilizing guerrilla and terror tactics against the Israelis. The irregulars, sanctioned and assisted in varying degrees by several of the Arab countries, staged raids across the borders, set off bombs, and shot at Israeli soldiers. The fact that Israel had occupied substantial portions of Arab territory in the 1967 war enabled the militants to establish clandestine movements among the population of those areas."
78. Yassar Arafat, Supra, note 76 at 47.
79. Yassar Arafat, Supra, note 76 at 48, "The final goal of what is called the political solution is nothing less than to return to the situation as it was before that war. This simply means that we have to carry on our struggle until our country is totally liberated. Revolutionaries, as you know, do not bargain."
80. Supra, note 76, at 46, "In interviews and statements Palestinian leaders have explained what they hope to accomplish through the use of terrorism. One of the leaders is George Habash, a medical doctor who heads a militant group called the Popular Front for the Liberation of Palestine. In an interview Habash explained the rationale behind terrorist activities by his organization. His words expressed the thinking of clandestine groups everywhere that rely primarily on terror tactics in order to combat a more powerful foe. Asked, 'What is heroic about striking a hospital or blowing up an airplane?', he replied:
It's guerrilla warfare, a special kind of guerrilla warfare.
The main point is to select targets where success is 100% assured. To harass, to upset, to work on the nerves....You should see how my people react to a successful operation!
Spirit shoots sky-high."
81. Murray, Japan's "Red Army" at War With World, The Observer (London), June 14, 1972, at 4, col. 6.
82. The Washington Post, June 14, 1972, at C9, Col. 4, "Turkish authorities said they captured 14 Turkish leftist guerrillas who landed on the country's Mediterranean coast 10 days ago. They said the band had been trained at Arab guerrilla camps, armed with Russian-made weapons and landed by a boat belonging to Al Fatah organization."
83. Forward in Europe, No. 1 1972 at 12, "Some members of the Committee had observed that it would be difficult for them to ask their parliaments to increase the aid granter hitherto, because of the acts of piracy and violence committed in certain member countries by Arab terrorists."
84. Supra, note 18, art. 49.
85. Supra note 70, at 16.
86. Int'l Rev. Red Cross No. 127, 557 (Oct. 1971).

87. Id., at 558-559.
88. Supra, note 61.
89. Supra, note 18, art. 42.
90. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.
91. Supra, note 86 at 558-559.
92. Int'l Rev. Red Cross No. 120, 154 (Mar 1971).
93. 10 Int'l Rev. Red Cross 88 (1970), "The fifth series of visits to places of detention in Israel and the occupied territories, which began on 8 October 1969, was completed towards the end of the year....In the course of this series ICRC delegates visited more than 3,000 detained Arabs with whom they were allowed to talk in private..."
94. Supra, note 18, art. 42.
95. William Khouny, Supra, note 76, at 49, "The Al Fatah, Al Saika and the PFPL (Popular Front for Palestinian Liberation) organization have dealt mortal blows to the Zionist occupants; they have waged hundreds of battles in the interior of occupied Palestine. Moshe Dayan, the Israeli Minister of Defense, was forced to admit that Israeli losses since the 5 June 1967 war have mounted to more than 1,600 soldiers."
96. S. Hadawi, Palestine: Loss of a Heritage 125 (1963).
97. Supra, note 70, at 25.
98. Supra, note 70, at 25.
99. Supra, note 96, at 124.
100. Supra, note 18, art. 35, "All protected persons who may desire to leave the territory at the outset of, or during the conflict, shall be entitled to do so..."
101. Supra, note 18, art. 33.
102. Supra, note 18, art. 53.
103. J. Pictet, The Geneva Conventions of August 12, 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 301 (1960).

104. Supra note 69 at 7, "Destruction of property has taken place in the absence of military operations. The villages of Yalu, Beit Nuba and Enmaus were totally destroyed. Ninety per cent of the 400 houses in the village of Beit Huma in the Hebron area were destroyed. About 135 houses in the Magharba quarter in Jerusalem, in the area near the Wailing Wall, were dynamited and bulldozed in 1967."
105. Supra, note 18, art. 53.
106. Supra, note 69, at 7, "In Gaza...houses were demolished in the aftermath of its occupation, in reprisal for the resistance of its citizens against the Israeli invasion. In Jerusalem, fifteen shops owned by prominent Arabs were confiscated in reprisal for the strike of the shopkeepers on November 2, 1968, the fifty-first anniversary of the Balfour Declaration. Houses in various cities and towns in the west bank were completely demolished under the pretext that their owners were relatives of resistance fighters or on the suspicion that they had harbored such persons or that their houses had been used to hide arms."
107. Supra, note 18, art. 33, "Reprisals against protected persons and their property is prohibited."
108. Supra. note 69, at 7.
109. Supra. note 18, art. 33, "Pillage is prohibited."
110. Supra. note 69, at 7.
111. Supra. note 69, at 7.
112. G.A. Res. 181, U.N. Doc. A/519 at 131,133 (1947).
113. General Armistice Agreement Between Israel and Egypt, Feb. 24, 1949, art v 2 (1949) 42 U.N.T.S. 251.
114. 2 L. Oppenheim, International Law § 231 (6th rev. ed. H. Lauterpacht ed. 1944), "Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities....(T)he condition of war remains between the belligerents themselves...on all points beyond the mere cessation of hostilities."
115. Supra, note 18, art. 47.
116. Supra, note 103, at 276, "A fundamental principle emerges...an Occupying Power continues to be bound to apply the Convention as a whole even when in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory."

117. Supra. note 18, art. 4, "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals."(emphasis added).
118. Supra, note 50, at 4.
119. Supra. note 69 at 5, "Israel has violated this paragraph by systematically establishing scores of Jewish settlements in the Golan Heights, the west bank and the Sinai Peninsula. Israeli citizens are transferred to these settlements as permanent occupants."
120. Supra. note 28, at 44.
121. Daily News Bulletin (New York), March 2, 1972, at 4, "Nathal Nethal Netzarium, a New Jewish settlement in the Gaza Strip, was officially established on March 1, 1972. It is located south of Gaza River."
122. Jewish Week-American Examiner (New York), March 30, 1972, at 17
"The Israel government announced in the Knesset that the Gaza Strip will never be separated from Israel, even if peace is established with the Arab states.
The statement was made to a special session of Parliament by Israel Galili, Minister without Portfolio, who said bluntly that the status of the Gaza Strip will not be open to question.
The minister, generally regarded as a spokesman for Prime Minister Golda Meir, made the customary statement that while Israel had no intentions of handing back the Gaza Strip to the Arabs who have been defeated in battle three times, this position did not mean the laying down of preconditions for peace talks with the Arabs.
He asserted that Israeli settlement in the Gaza Strip was not in contradiction to Israel's declared policy that all outstanding issues with the Arabs were negotiable. He affirmed, once again, that Israel would not return to the borders existing before the Six-Day War.
The issue of the Gaza Strip was brought before the Knesset by three motions--moved by Gahal, the Free Center of the State List--protesting what they called Mapam incitement against settlement in the Rafah area of Gaza.
Mapam made it an issue when it was charged that Bedouin were being evicted from a track of land taken over by the Israel Army for eventual Israeli settlement."
123. Supra. note 57 at 162.
124. Supra. note 54 at 66.
125. Supra. note 50 at 2.
126. Supra. note 76 at 46.

127. The Washington Post, June 29, 1972, at A23, col. 1, "The Palestinian guerrillas have decided to suspend their operations against Israel from South Lebanon. An agreement to this effect was reportedly concluded tuesday night at a meeting between the Lebanese Premier Saeb Salem and Fatah leader Yasser Arafat....Since Jordan tolerates no operations at all and Syria strictly limits them, there is now no point along Israel's borders where they are more or less masters of their own actions...."
128. Supra. note 50 at 3.
129. Supra. note 50 at 3.
130. Jewish Week-American Examiner (New York) April 6, 1972, at 7, "Defense Minister Moshe Dayan indicated in a radio interview that Israel intends to retain military control of the West Bank indefinitely and declared that even in the event of a peace settlement the area must be open to Jewish settlement. He also favored Jewish settlement in the Gaza Strip despite the population density there. 'I do not believe we should remove our soldiers from the Jordan (river) with the present situation in the Arab world being what it is,' Dayan said.
 "We must be in a position to control the entire West Bank absolutely should the need arise and to fight terrorists there if the Fatah continues, or stops and then renews their activity."
131. Supra. note 18, art. 49. "The Occupying Power shall not depart or transfer part of its own civilian population into the territory it occupies."
132. Supra. note 103 at 283.
133. M. McDougal & F. Feliciano, Law and Minimum World Public Order 312 (1961).
134. R. Randle, Geneva 1954 The Settlement of the Indochinese War 3 (1969).
135. Id. at 389.
136. Id. at 431.
137. Id. at 430.
138. Id. at 213.
139. Dep't of State (Legal Adviser), The Legality of the United States Participation in the Defense of Viet-Nam, 54 Dep't of State Bulletin 474 (1966), 60 Am. J. Int'l L. 565 (1966) "During the 5 years following the Geneva Conference of 1954, the Hanoi regime developed a covert political-military organization in South Viet-Nam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva accords."

140. Hearings on American Prisoners of War in Vietnam before the Subcomm. on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, 91st Cong., 1st sess. 19 (1969).
141. Supra. note 134 at 570-571.
142. Supra. note 139 at 577.
143. Supra. note 134 at 570-571.
144. Supra. note 139 at 577.
145. 2 Peaslee (Constitutions) Ch.I, art. 7 (Democratic Republic North Vietnam 1959).
146. 1 U.S. Dep't of State, Pub. No. 6446, American Foreign Policy 1950-1955 750 (1957).
147. Supra. note 139.
148. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, (1955) 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28.
149. Quade, The U.S. and Wars of National Liberation, in 1 The Vietnam War and International Law 102,114 (ed. R. Falk 1968).
150. T. Tiede, Calley Soldier or Killer 37 (1971).
151. Stern, Shock Grips Red Massacre Village, The Washington Post, June 16, 1970, at A1, col. 6.
152. The Massacre of Dak Son, Time, vol. 90, no. 24, Dec. 15, 1967, at 32.
153. Solf, A Response to Tedford Taylor's Nuremberg and Vietnam; An American Tragedy, 5 Akron L. Rev. 43, 48 (1972).
154. Supra, note 18, art. 27.
155. Supra. note 18, art. 32.
156. Hosmer, Viet Cong Repression and Its Implications for the Future, in Staff of Senate Comm. on the Judiciary, 92nd Cong., 2d. sess., The Human Cost of Communism in Vietnam, 55 (Comm. Print 1972).
157. Staff of Senate Comm. on the Judiciary, 92nd Cong., 2d. sess., The Human Cost of Communism in Vietnam 64 (Comm. Print 1972).
158. Supra. note 157 at 64.
159. Supra. note 157 at 89.
160. Supra, note 157 at 90.

161. Supra, note 157 at 91.
162. Supra, note 5, annex art. 46 , "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."
163. 1 Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945 - 1 October 1946 232 (1947).
164. 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 535 (1950).
165. Supra. note 18, art. 1.
166. Supra. note 103 at 16.
167. Villagers Tell of Occupation of Their Town by Hanoi, The Washington Post, June 30, 1972, at A6, col. 1.
168. Supra. note 18, art. 51.
169. The Washington Post, June 4, 1972, at A10, col. 3, "...Capt. Harold Moffett, a U.S. Adviser back from Anloc reported he witnessed a Communist tank massacre 100 women and children inside a church in the besieged city. Later that day, North Vietnamese artillery opened up on a hospital and killed all its occupants."
170. Honey, Vietnam: If the Communists Won, supra, note 156 at 110-111.
171. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Accession, Aug. 12, 1949, (1957), 274 U.N.T.S. 341.
172. Supra. note 148.
173. Supra, note 17 at 271.
174. Supra, note 150.
175. U.S. v. Bumgarner, 43 C.M.R. 559 (1970) Convicted of Killing 3 South Vietnamese civilians while on a combat mission.
176. Supra, note 170.
177. Supra, note 17, at 265.
178. Supra, note 18, art. 146.
179. Supra, note 86.
180. Supra, note 90.
181. Supra, note 86, at 557-560, supra, note 92.

182. Hearings on American Prisoners of War in Southeast Asia 1971 before the Subcomm. on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, 92nd Cong., 1st sess. 528 (1971).
183. Id. at 317.
184. Id.
185. Id. at 318.
186. Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.
187. H. Levie, Maltreatment of P.O.W.'s in Vietnam, in 2 The Vietnam War and International Law 361, 375 (ed. R. Falk 1968).
188. Id. at 376.
189. Supra, note 182 at 215, 222, 254, 374 and 406.
190. Statement of Secretary of Defense, Melvin R. Laird, before the Senate Committee on Foreign Relations, Nov. 24, 1970.
191. Supra, note 182 at 318.
192. Supra, note 182 at 3, 6 Int'l Rev. Red Cross 399, 404 (1966). "some of prisoners were forced, in July 1966, to parade in front of the population during a demonstration organized in the streets of Hanoi."
193. Supra, note 182 at 5.
194. Supra, note 182 at 318.
195. Supra, note 182 at 7.
196. Hearings on American Prisoners of War in Vietnam before the Subcomm. on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, 91st Cong., 1st sess. 34-35 (1969).
197. Id. at 10-11, "Xuan Thuy responded...by telling reporters that the United States would 'never' have a list of prisoners as long as the war continued and until the United States has withdrawn its troops from Vietnam...".
198. Supra note 182 at 454-455.

199. 6 Int'l Rev. Red Cross 399, 403 (1966), "The Red Cross and the authorities of the DRVN have made known to the ICRC that the captured American pilots are treated humanely, but that they cannot, however be considered as prisoners of war. The DRVN Government is in fact of the opinion that the bombing attacks constitute crimes for which these prisoners will have to answer before the courts and that the Third Geneva Convention (prisoners of war) is consequently not applicable to them. This Government has...recalled the reservations made by the DRVN to Article 85... prisoners of war convicted of war crimes would no longer have the right to protection under the said convention." Supra, note 182 at 448-449.
200. Supra, note 171.
201. Supra, note 187 at 375, "... (N)o report has been found of a Viet Cong or North Vietnamese charge of improper treatment of their captured personnel by United States military forces..."
202. Id. at 378.
203. Supra, note 182 at 407.
204. 116 CONG. REC. H9020 (daily ed. Sept. 22, 1970), (remarks of Col. Borman).
205. Supra, note 182 at 567.
206. Supra, note 186 art. 2.
207. 6 Int'l Rev. Red Cross 399, 400 (1966), "The National Liberation Front informed the ICRC in October 1965 that, since it did not participate in the Geneva Conventions, it was not bound by them and that these conventions contained provisions which corresponded neither with its action nor with the organization of its armed forces..."
208. Supra, note 187 at 368 "The only specific legal excuse ever advanced by North Vietnam for its insistence that the Convention is not applicable... has been that there is no 'declared war'."
209. Supra, note 187 at 383.
210. Supra, note 186, art. 3.
211. Id.
212. J. Pictet, The Geneva Conventions of August 12, 1949, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War 30 (1960).
213. Agreement Between The Commander-in-Chief of the French Union Forces In Indo-China And The Commander-in-Chief of the Peoples Army of Viet-Nam on The Cessation of Hostilities in Viet-Nam, Great Britain, Misc. No 20 (1954) (Cmd. 9239) at 27; 161 Brit. and For. State Papers 818 (1954); 60 Am. J. Int'l L. 643 (1966).

214. Supra, note 4 at 1135 and 1136.
215. Supra, note 207 at 403.
216. 5 Int'l Rev. Red Cross 527, 528 (1966) "... (T)he Government of the Democratic Republic of Vietnam consider(s) the...pilots...as major criminals...and liable for judgment...although captured pilots are well treated."
217. Supra, note 182 at 519.
218. Supra, note 187 at 364.
219. Supra, note 182 at 406.
220. Id.
221. T. Taylor, Nuremberg and Vietnam: An American Tragedy 150 (1970).
222. Supra, note 186, art. 25, "Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area...The premises provided for the use of prisoners of war...shall be entirely protected from dampness and adequately heated and lighted..."
223. Supra, note 204.
224. 5 Int'l Rev. Red Cross 527 (1966).
225. Supra, note 186, art. 126.
226. Supra, note 171.
227. Supra, note 186, art. 85.
228. Supra, note 171.
229. Supra, note 212 at 424.
230. Supra, note 187 at 377, "There is no provision in the convention making a contracting party responsible for violations committed by one of its allies against prisoners of war captured and held by that ally."
231. Supra, note 187 at 378, "To reduce these incidents of SVN POW abuse U.S. stopped practice of turning POWs over to SVN in the field. They are now taken to divisional headquarters and then delivered directly to the POW camps."
232. Cong. Research Svc. -Lib. of Cong., Prisoners of War: Depatriation or Internment in Wartime 20 (1971).
233. K. Clauswitz, Principles of War 31 (1942) describing maneuvers used to move troops and artillery into battle.

234. M. Greenspan, The Modern Law of Land Warfare 53 (1959).
235. Hague Convention No. V Rights and Duties of Neutral Powers and Persons in War on Land, Oct. 18, 1907, (1910), 36 Stat. 2310 T.S. 540 art. 2
"Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral state." art. 4
"A neutral power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory."
236. Supra, note 76 at 45-46.
237. Supra, note 234 at 545.
238. Marichella, Minimanual of the Urban Guerrilla, in Terror and Urban Guerrillas, A study of Tactics and Documents 67, 73 (ed. J. Mallin 1971),
"The urban guerrilla must know how to live among the people and must be careful not to appear strange and seperated from ordinary city life. He should not wear clothes that are different from those that other people wear."
239. Supra, note 157 at 80, "Villagers suspected of cooperating with the government are singled out for punishment. Guerrillas dressed as government troops infiltrated Binh Trieu hamlet on July 25, and shot five civilians they accused of being spies 'for the national police'."
240. Supra, note 157 at 80, "To try to nullify the work of pacification teams, the Vietcong have attacked villages killing the inhabitants and destroying homes."
241. Yassar Arafat, Supra, note 76 at 48, "As for the enemy, the importance of this strategy is to eliminate the gap in his army between relaxation and readiness...This leads to enemy exhaustion through continuous operations, whether by attacking military and industrial targets or by destroying shipping lines wherever they are."
242. Supra, note 235, art. 7.
243. Schwarzenberger, Terrorists, Guerrilleros, and Mercenaries, U. Tol. L. Rev. Fall-Winter, 1971, at 78.
244. Id. at 71.
245. Id. at 71-72.
246. Id. at 72.
247. Supra, note 12 at 17.

248. Int'l Red Cross, Rules Applicable in Guerrilla Warfare, in Conf. of Gov't Experts on the Reaffirmation and Development of Int'l Humanitarian Law Applicable in Armed Conflicts, held at Geneva 24 May-12 June 1971, CE/6b (1971) a6 12, "... (G)uerrillas should be recognizable as combatants before opening fire, so as to protect the civilian population as much as possible..."
249. Id. at 11.
250. Id.
251. Supra, note 243 at 75.
252. Supra, note 234 at 54, "The Soviet Union in World War II regarded its guerrilla forces as an integral part of its armed forces, and one of its leading international jurists has claimed that 'popular guerrilla warfare in the rear of an aggressor' is under the protection of international law. He distinguishes, however, between guerrillas engaged in a 'just' war and those furthering an 'unjust' aggressive war, declaring the latter are not protected."
253. Supra, note 17 at 265.
254. Supra, note 243 at 81.
255. Supra, note 238.
256. Supra, note 186, art. 4.
257. Supra, note 243 at 88, "In all probability, any further relaxation of the conditions with which irregular armed forces have to comply would lead to all civilians becoming even more suspect than they are now of being guerrillos and being treated as legitimate objects of warfare."
258. Supra, note 5, art. 22.
259. Ofc. Chief Couns. for Pros. of Axis Crim., Nazi Conspiracy and Aggression: Opinion and Judgment 83 (1947) "The (Hague Convention of 1907) rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war,'...by 1939 these rules laid down in the convention were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war..."
260. Supra, note 234 at 421.
261. Dep't of Navy, Law of Naval Warfare NWIP 10-2, w. chg. 4, § 220 (1955).
262. Id.
263. Id. § 220a.

264. Id. § 220b.
265. Id. § 220c.
266. Supra, note 12, at 96-97.
267. Mallison, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, 58 Int'l Law Studies 19, U.S. Naval War College (1966), "Laws of War of ideal doctrinal content would emphasize the principle of humanity over other principles. Such laws of war without enforcement would be less effective in protecting human values than laws in which the doctrinal content is frankly recognized as a compromise between humanitarianism and military necessity and which have at least a measure of enforcement."
268. Id.
269. Supra, note 234 at 371.
270. Id.
271. Pentagon Confirms Tear Gas Bombing, The Evening Star and Daily News (Washington), July 14, 1972, at A-11, col. 7.
272. Id.
273. Supra, note 248 at 36.
274. Supra, note 150.
275. Supra, note 157 at 89.
276. Supra, note 248 at 31, "There is...no reason to differentiate between indiscriminate 'terrorism' by guerrilleros against the population and the equally indiscriminate attacks perpetrated by the air force, artillery or infantry of the regular forces."
277. Hoagland, 18 Lebanese Civilians Killed as Israel Resumes Attacks, The Washington Post, June 24, 1972, at A-5, col. 1.
278. Supra, note 234 at 61, "Guerrillas who do not comply with the provisions laid down may perform patriotic service for their country (just as espionage agents often do), yet such illegitimate hostilities come within the technical heading of war crimes, and their perpetrators must be prepared to take their punishment if captured."
279. Supra, note 261 § 221b; G.A. Res. 2444, 23 U.N. GAOR Supp. 18, at 50, U.N. Doc. A/7218 (1968), passed 111 for to 0 against.
280. Supra, note 261 § 310D.
281. Supra, note 18, art. 28.
282. Supra, note 234 at 336.

283. Supra, note 234 at 279.
284. Supra, note 238.
285. Supra, note 12 at 112.
286. A. Dallin, German Rule in Russia 1941-1945 A Study of Occupation Policies 420 (1957) "The official Soviet position, that any soldier who fell into enemy hands was ipso facto a traitor and deserved no protection from his government, made its contribution to the mistreatment of prisoners in the Reich. This was the line taken by Moscow when the International Red Cross made overtures during the war with the aim at reaching an understanding with Axis powers regarding captives."
287. Supra, note 187 at 364, "During the Korean hostilities the North Korean Government announced that its forces were 'strictly abiding by principles of Geneva Conventions in respect to Prisoners of War'...Despite this, only two lists of American prisoners of war, totaling just 110 names, were ever sent to the Central Tracing Agency of the ICRC...death marches occurred, prisoners of war were inadequately fed..."
288. Supra, note 186.
Supra, note 18.
289. Supra, note 234 at 10.
290. Supra, note 234 at 404.
Supra, note 261 § 330.
291. Supra, note 361 § 330b.
292. Supra, note 150.
293. Supra, note 286.
294. Supra, note 286.
295. Sponsler, The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen, 15-16 Loyola L. Rev. 43, 57 (1968-70).
296. B. Fall, The Two Vietnams 155-156 (1967).
297. 2 Peaslee (Constitutions) Ch. I, art. 7 (Democratic Republic North Vietnam 1959) "The state strictly prohibits and punishes all acts of treason, opposition to the democratic system, or opposition to the reunification of the Fatherland."
298. Supra, note 182 at 310-311.
299. Supra, note 182 at 6.
300. Supra, note 140 at 26.
301. Supra, note 182 at 6.

302. Supra, note 186, art. 118.
303. Supra, note 182 at 519.
304. Supra, note 121.
305. Supra, note 122.
306. Supra, note 123.
307. Kalb, Vientianne: Dead End for POW Kin, The Evening Star (Washington), March 11, 1972, at A-1, col. 1.
308. Supra, note 156 at 50.
309. Supra, note 234 at 623-624.
310. Id.
311. Supra, note 164 at 534.
312. Supra, note 133 at 681.
313. P. Jessup, The Modern Law of Nations 157 (1952).
314. Supra, note 133 at 358.
315. Q. Wright, A Study of War 1071 (1965).
316. Supra, note 234 at 421.
317. Supra, note 295 at 65-66.
318. Supra, note 234 at 9.
319. J. Stone, Quest for Survival, The Role of Law and Foreign Policy 19(1961).
320. Supra, note 133 at 271.
321. Supra, note 212 at 23.
322. 2 L. Oppenheim International Law 557-558 (6th rev. ed. H. Lauterpacht ed. 1944) U.S. Dep't of the Army, The Law of Land Warfare § 495 (1956).
323. U.S. Dep't of the Army, The Law of Land Warfare § § 497b & 497d (1956).
324. Supra, notes 62 and 63.
325. G.A. Res. 2628, 25 U.N. GAOR Supp. 28, at 4, U.N. Doc. A/8028 (1970) "Deploing the continued occupation of the Arab territories since 5 June 1967..."

326. 7 Int'l Rev. Red Cross 19 (1967) "The Ministry of Foreign Affairs in Hanoi has declared that it could not accept the proposal made by the United States to hold a conference in order to examine ways of applying the Geneva Conventions, a proposal which had been transmitted by the ICRC...."
327. Supra, note 140 at 44.
328. Supra, note 182 at 20-21.
329. Supra, note 140 at 9.
330. Id. at 10-11.
331. Supra, note 323, § 497a; Supra, note 114 at 561-562.
332. Supra, note 323, § 497b.
333. Hearings on Chemical-biological Warfare: U.S. Policies and International Effects before the Subcomm. on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, 91st Cong., 1st sess., at 250 (1969).
334. U.S. Dep't of State, Pub. No. 8505, North Viet Nam I (rev. 1969).
335. Supra, note 333 at 500.
336. J. Appleman, Military Tribunals and International Crimes 10 (1954).
337. Supra, note 18, arts. 146 & 147; Supra, note 186, arts. 129 & 130.
338. Supra, note 153 at 65, "The Convention not only precludes a Detaining Power from trying prisoners of war by special ad hoc national tribunals, but it also precludes, for all practical purposes, their trial by International Military Tribunals. The Grave Breaches Articles provide only for trials in national courts.... Thus the International Military Tribunals of Nuremberg and Tokyo may represent an almost unique position in history."
339. Id.
340. Supra, note 18, arts. 146 & 147; Supra, note 186, arts. 129 & 130.
341. Supra, note 12 at 108.
342. Supra, note 12 at 21.
343. Supra, note 267 at 21.
344. Supra, note 336 at 10.

345. Supra, note 133 at 682, "It is a common emphasis that the legitimate purpose of reprisals is not the infliction of retribution but the deterrence of future lawfulness....Upon the other hand, violence so gross as to have no reasonable relation to the postulated deterrent effect is appropriately characterized not as a legitimate reprisal, but as a new and independent unlawful act."
346. Supra, note 24 at 379.
347. Supra, note 234 at 413 "Justifiable reprisals do not entitle the enemy to institute counter-reprisals."
348. Supra, note 234 at 411.
349. Supra, note 234 at 422 "The purpose of war-crimes punishment is, in the main, deterrent..."
350. Supra, note 12 at 23.
351. Supra, note 133 at 375.
352. Supra, note 133 at 348.
353. Supra, note 133 at 266.
354. Supra, note 58 at 53.
355. Franck & Cherkis, The Problem of Fact-Finding in International Disputes, 18 W. Res. L. Rev. 1483, 1487 (1967) "...[I]s there any answer to the credibility chasm...The answer devised...by some international and national decision-makers is to constitute a fact-finding system utilizing persons whose psychological makeup, independence, training, and reputation for perspicacity is such that their fact determinations...will carry a respectable warrant of credibility."
356. Supra, note 18, art. 149, "At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall repress it with the least possible delay."
357. Supra, note 18, art. 1; Supra, note 186, art. 1.
358. Supra, note 133 at 377.
359. P. Wild, Sanctions and Treaty Enforcement 210 (1934).
360. Supra, note 133 at 262.
361. U.N. Doc. A/8313 (1971) at 61.

362. ICRC. Conf. Gvt. Experts, Geneva, 1971 Doc. D-0-1252/b/e, at 93.
363. Supra, note 361 at 39.
364. Supra, note 361 at 6, comments by Belgium, "... (W)ays of obliging parties to an armed conflict to observe the recognized rules should be sought and a system of international supervision established. However... the greatest caution should be exercised in introducing a system that would supplement the system under which ICRC acts."
365. Supra, note 361 at 68, "... (I)t is proposed that international machinery should be established to supervise the observance of human rights in armed conflicts. In this connexion, it must be stated that existing institutions should be used to supervise the application of humanitarian rules in armed conflicts."
366. Supra, note 362 at 101, question 11, "should the role of regional organizations in supervision be examined?" The states replying to this question answered in the affirmative by 8 to 5.
367. Supra, note 12 at 101-102.
368. U.N. Charter art. 1.
369. J. Pictet, The Geneva Conventions of August 12, 1949, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field 9 (1952).
370. Lauterpacht, The Limits of the Operation of the Law of War, 30 Brit. Y. B. Int'l L. 203, 214 (1953).
371. Final Act of the Int'l Conf. on Human Rights, May 13, 1968, GOAR A/Conf. 32/41.
372. K. Marx & F. Engels, Manifesto of the Communist Party 108 (1951).
373. Ramundo, Czechoslovakia and the Law of Peaceful Coexistence: Legal Characterization in the Soviet National Interest, 22 Stan. L. Rev. 963, 972 (1970).
374. Hazaad, Renewed Emphasis Upon a Socialist International Law, 65 Am. J. Int'l L. 142, 147 (1971).
375. Supra, note 243 at 84.
376. Supra, note 24 at 400.
377. The Effectiveness of International Decisions, Papers of a Conference of The American Society of International Law and the Proceedings of the Conference 45 (ed. S. Schwebel 1971).
378. Supra, note 361 at 68.

379. Supra, note 361 at 9.
380. B. Ramundo, Peaceful Coexistence 121 (1967).
381. Id. at 116.
382. Supra, note 373 at 972.
383. Supra, note 295 at 56-57.
384. Supra, note 361 at 67.
385. Supra, note 295 at 56-67.
386. Supra, note 7 at 35.
387. Supra, note 286.
388. Supra, note 182 at 323.
389. Unozurike, International Law and Colonialism in Africa, 3 E Afr. L. Rev. 47, 80-81 (1970) "... (T)he international law developed by Western powers before the 20th century served as a buttress for the colonisation of African peoples. It connived at the subordination of African dignity to Western economic interests. It was essentially racist and therefore contrary to the basic norms of law applicable to all mankind. In creating the relevant rules of international law, Africans were not consulted for the law was specifically directed against them."
390. Sinha, Some Reflections on the Impact of New Nations on International Law, 13 How. L. J. 349, 354 (1967).
391. Supra, note 133 at 375.
392. Supra, note 58 at 59.
393. Supra, note 9 at 653.
394. McDougal & Reisman, Rhodesia and the United Nations: The Lawfulness of International Concern, 62 Am. J. Int'l L. 1, 18 (1968).
395. U. N. Charter art. 51.
396. Respect for Human Rights in Armed Conflict, Agenda Item No. 52 (a), U. N. Doc. A/8370 (1971).
397. Supra, note 366.
398. Supra, note 362, at 17, 18, 20, & 22.
399. U. N. Charter, art. 1.
400. Id., art. 2.

401. Id., arts. 41 & 42.
402. Id., arts. 29 & 34.
403. Id., art. 23.
404. Id., art. 27.
405. Gross, Voting in the Security Council: Abstention from Voting and Absence from Meetings, 60 Yale L. J. 209, 254 (1951).
406. McDougal & Gardner, The Veto and the charter: An Interpretation for Survival 60 Yale L. J. 257, 266 (1951).
407. Supra, note 362 at 76, "Is it possible and desirable to set up a permanent supervisory body within the United Nations." Of those states which responded to this question, 9 indicated yes and 7 no.
408. G. Clark & L. Sohn, World Peace through World Law 75 (3rd ed. 1966).
409. U. N. Charter art. 18: Supra, note 133 at 362.
410. U. N. Charter art. 92.
411. Id. art 93.
412. I. C. J. Stat. art. 50 & art. 34, para. 2.
413. Id., art. 34, para. 1 "Only states may be parties in cases before the Court."
414. Id. art. 36.
415. Id. art. 35, paras. 1 & 2.
416. Supra. 380 at 186 & 187.
417. Supra, note 71, the final draft passed by a vote of 67 with 2 abstentions and therefore indicates support for a U. N. role.
418. Supra, note 315 at 913.
419. Supra, note 134 at 943.
420. Kelsen, The Essence of International Law, in Essays in Honor of Leo Gross 90 (ed. K. Deutsch & S. Hoffman 1968),
421. Supra, note 359 at 212.
422. Supra, note 133 at 344.

423. Supra, note 267 at 19, "... (T)he sanction of the laws of war is the common conviction of the participants in the war or hostilities that self-interest is advanced by adhering to the law rather than by violating it."
424. Supra, note 362 ques. 15 at 131.
425. Supra, note 234 at 403.
426. Supra, note 261 § 300; supra, note 234 at 405.
427. Supra, note 234 at 10.
428. Supra, note 14 at 748.
429. Supra, note 362 ques. 15 at 131.
430. Supra, note 7 at 36.
431. Supra, note 261 § 310c.
432. Id., § 310e.
433. Id., § 310b.
434. U. N. Charter arts. 42 & 43.
435. Security Council Resolution Voting Sanctions Against Southern Rhodesia, 56 Dep't State Bull. 73, 77-78 (1967).
436. Supra, note 14 at 748.
437. Holton, International Law and Sanctions - European Community Penalties for Private Parties, 33 Kan. C. L. Rev. 22 (1965); Supra, note 58 at 60.
438. Supra, note 359 at 220.
439. Id., at 208.
440. Supra, note 234 at 406, "While the use of good offices and mediation by a neutral state are friendly acts, intervention stands on a different footing. Intervention is, in effect, an attempt to compel a belligerent to comply with the dictates of the intervening state, which means in the present case compliance with the laws of war. Obviously, only a neutral state more powerful than the offending belligerent, or a powerful combination of neutral states, would risk such action..."
441. Supra, note 18, art. 1.
442. Supra, note 389 at 81.
443. Supra, note 133 at 356.

444. Convention on Human Rights and Fundamental Freedoms, 1950 Europ. T. S., 213 U. N. T. S. 221.
445. Supra, note 4.
446. A. del Russo. International Protection of Human Rights 239 (1971).
447. Supra, note 389 at 81.
448. Supra, note 378, G. A. Res. 2674, 2676 & 2677, 25 U. N. GAOR supp. 28, at 75-78, U. N. Doc. A/8028 (1970).
449. G.A. Res. 2675, 25 U. N. GOAR supp. 28, at 76, U.N. Doc. A/8028 (1970).
450. Supra, note 18, art. 146; Supra, note 186, art. 129.
451. Supra, note 5, art. 3.
452. Supra, note 355 at 1496, 1496-1503, & 1494.
453. Supra, note 412, art. 50.
454. Supra, note 412, art. 20.
455. Higgins, Compliance with United Nations Decisions on Peace and Security and Human Rights Questions, in The Effectiveness of International Decisions Papers of a conference of The American Society of International Law and the Proceedings of the Conference 32, 45 (ed. S. Schwebel 1971).
456. Supra, note 450.
457. Supra, notes 18 & 186, art. 1.
458. Supra, note 186, art. 130.
459. Supra, note 18, art. 147.
460. Supra, notes 163 & 164.
461. European Coal and Steel Community Treaty, July 23, 1952, art. 14, 261 U.N.T.S. 144.
462. Id.
463. Id. art. 47.
464. Supra, note 412, art. 34.
465. Id., art. 36.

466. 25 I.C.J. Y.B. 32 (1970-71) "The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open.", see also n. 2.
467. Id., at 74-86.
468. Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature, Aug. 12, 1949, Ratification by Democratic Republic of China (1957) 260 U.N.T.S. 442; Ratification by Russia (1954) 191 U.N.T.S. 367.
469. Supra, note 18, art 147.
470. Charter of the International Military Tribunal supra, note 163, 10, 11 "WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include...deportation to slave labor or for any other purpose of civilian population of or in occupied territory...plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

see also count 3 (E) 3 at 56 and count 3 (E) 7 at 57, "3...(T)hey confiscated businesses, plants and other property." "7. They abrogated the rights of the local populations in the occupied portions of the U.S.S.R. and Poland and in other countries to develop or manage agriculture and industrial properties, and reserved this area for exclusive settlement, development and ownership by Germans and their so-called racial brethern."
471. Supra, note 261 § 310b.
472. Supra, notes 121 & 122.
473. Supra, note 62
G.A. Res. 2628, 25 U. N. GOAR supp. 28, at 5, U.N. Doc. A/8028 (1970).
474. G. A. Res. 2628, 25 U.N. GAOR supp. 28, at 5, U. N. Doc. A/8028 (1970).
475. Supra, note 18, art. 147.
476. Hempstone, Lot's Wife and Israel: Nuclear Capabilities, The Evening Star (Washington) March 22, 1972, at A-21, col. 1.

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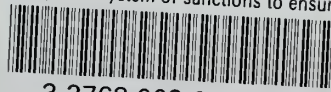
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